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DIARY FOR NOVEMBER.

1. SUNDAY..... *22nd Sunday after Trinity.*
8. SUNDAY..... *23rd Sunday after Trinity.*
11. Wednesday.. Last day for service for County Court.
15. SUNDAY .... *24th Sunday after Trinity.*
16. Monday..... Michaelmas Term begins. Chancery Hearing Term commences.
20. Friday ..... Paper Day, Q. B.
21. Saturday..... Paper Day, C. P. Declare for Co. Court.
22. SUNDAY .... *25th Sunday after Trinity.*
23. Monday ..... Paper Day, Q. B.
24. Tuesday ..... Paper Day, C. P.
25. Wednesday.. Paper Day, Q. B.
26. Thursday .... Paper Day, C. P.
28. Saturday..... Michaelmas Term ends.
29. SUNDAY .... *1st Sunday in Advent.*
30. Monday..... Last day for notice of Trial for Co. Court.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

NOVEMBER, 1863.

ASSOCIATIONS FOR THE AMENDMENT OF LAW.

Law is a progressive science; but never can be said to be perfect. The aim of all is to make it as perfect as possible. The attempts to perfect it occasion amendments, which amendments should be carefully and considerately made, and made when necessary.

The ability to amend pre-supposes an acquaintance with the law to be amended—its working in regard to the relations of life. Law is a rule of action. Its imperfections are discovered by reason and experience.

None are more conversant with the law than those who are engaged in its administration. Men whose business it is to advise upon its application to the affairs of life, are those who not only discover its short-comings, but are most competent to suggest the requisite remedies.

Suggestions to be of real value ought to be systematized. Our law makers are not all lawyers. There is no officer whose special duty it is to suggest and superintend amendments of the law. Much, therefore, is left to spontaneous action, without the direction necessary to secure for the action the most beneficial effect.

Hence it is that associations for the amendment of the law are not only laudable but necessary. The aggregation of trained minds on subjects with which the minds are intimately conversant works an immense amount of good. No association of the kind has yet been formed in Upper Canada. Our object is to point out the working of the Association for the Amendment of the Law in the mother country, of which we so often hear, in the hope that the profession in Upper Canada may be stimulated to imitate it.

It is about twenty years since the "Society for Promoting the Amendment of the Law" was first established in London. Most of us are familiar with its name, and some of us are familiar with its working. Though still in its infancy, it has done the State good service. It is not composed simply of lawyers, but of eminent laymen. All work together for the common weal.

The declared object of the association is to promote, by discussion and otherwise, the careful and cautious improvement of the law of England in all its branches; to point out to the Legislature and the public the defects in the legal system; and to suggest appropriate remedies.

The association consists of honorary, corporate and ordinary members. Any gentleman may become an ordinary member. Chambers of commerce, town councils, law societies, and other bodies associated for any public object are eligible as corporate members. Honorary members are generally distinguished foreigners, or persons holding a judicial position, or former ordinary members who have left England. The officers of the association are a president, vice-presidents, treasurer, secretary, and eighteen managers. These compose the council by which the association is governed.

The veteran law reformer, Lord Brougham, is president of the association. Among the vice-presidents we find the Lord Chancellor, the Lord Chief Justice of the Queen's Bench, the Judge of the High Court of Admiralty, Vice-Chancellor Wood, Mr. Justice Keating, Sir Fitzroy Kelly, the Judge Advocate General, and others whose names are well-known to legal fame. Among the ordinary members we find the Attorney General, the Duke of Cleveland, Lord Ebury, Sir F. H. Goldsmid, Q.C., the Recorder of London, the Commissioner of the Court of Bankruptcy, the Lord Justice General of Scotland, the Lord Advocate of Scotland, several county court judges, queen's counsel, barristers, solicitors, members of Parliament, and other laymen. Among the corporate members we find the Belfast Chamber of Commerce, the Liverpool Chamber of Commerce, the Dublin Chamber of Commerce, the Glasgow Chamber of Commerce, the Manchester Chamber of Commerce, the Plymouth Chamber of Commerce, the Faculty of Procurators, Glasgow, the London Association for the Protection of Trade. Among the honorary members we find Chief Baron Pollock, Chief Justice Earle, the Right Hon. Joseph Napier, the Attorney-General of Hong-Kong, the Consular Judge at Constantinople, M. Troplong, M. Guizot, M. Berryer, and David Dudley Field.

There is an Annual Session, commencing in November and ending in July. During the session a number of general meetings are held for the reception of reports and papers, and for discussions.

If a member be desirous of bringing any subject before the association for consideration, he may do so in one of three ways:

1. He may read a paper to the association, having first obtained the consent of the council.

2. He may move a resolution on the subject at a general meeting.

3. He may address a communication to the council.

The association or council, as the case may be, will then, if they think fit, refer the paper, resolution or communication to a committee to consider and report thereon.

Every report of a committee is read at a general meeting. Papers and reports are printed by the association, and supplied gratuitously to every member. In order to facilitate its enquiries, the association has fitted up its rooms with an excellent law and parliamentary library, which is open at all hours of the day.

Ordinary and corporate members are elected by the association at its general meetings. The elections are by ballot, and one black ball in seven excludes. Honorary members are elected by the council, who report the elections to the general meetings for confirmation. Every member may propose an ordinary or corporate member by sending the name and address of the candidate for insertion, with the name of the proposer, in a book kept for that purpose. Every body entitled to corporate membership may, from time to time, nominate any number of its members, not exceeding five, as its representatives; and such representatives have all the rights of ordinary members, except that of being president, vice-president, manager, treasurer or secretary.

Ordinary members pay an annual subscription of two guineas, or a life subscription of ten guineas; corporate members pay an annual subscription of two guineas; honorary members are exempt from all payment. Both annual and life subscriptions are payable on the election of members, and payment in every case precedes membership. The first annual subscription is paid for the current year ending 31st October following election; and all future annual subscriptions are payable in advance on 1st November. Annual subscriptions of ordinary members are convertible into life subscriptions on payment of twenty guineas.

An annual meeting is held in June, appointed by the council, of which fourteen days' notice is given by the secretary to all the members. General and special meetings are held on days appointed by the association or council.

The president and vice-presidents are elected at the annual meeting, on motion, by show of hands, or (if a ballot be demanded at the time by at least seven members) by ballot. The managers are also elected at the annual meeting, by the members present, by means of voting papers. Any two members of the association may, by writing signed by them, nominate one ordinary member for election as manager; and every such nomination must be sent to the secretary eight days before the annual meeting. Managers are eligible for reëlection without nomination. Four days before the annual meeting the secretary is to send to all the members a list containing—

1. The names of the managers for the current year who have not given notice in writing of intention to retire.

2. The names of ordinary members nominated for managers.

A voting-paper containing the last-mentioned list is supplied to each member present at the annual meeting, who, after reducing the number of names to not more than eighteen, hands in the voting-paper to the secretary, within one hour from the commencement of the meeting, at the expiration of which time two scrutineers, appointed at the meeting, declare the results of the voting. In the event of an equality of votes, rendering the election as between two or more of the proposed managers uncertain, the result is determined by ballot.

The council, within fourteen days after the annual meeting, appoint the treasurer and the secretary for the current year.

Any vacancy occurring during the year in the office of president or manager, may be filled up at a general meeting (of which seven days' notice is sent by the secretary to all the members) on motion, by show of hands, or (if a ballot be demanded at the time by at least seven members) by ballot.

The association at the general meetings appoint standing committees, and also special committees to consider and report on specific subjects of reference.

Such is the working of the association. It is simple, and yet sufficient for all practical purposes. And we are glad to say that year by year the influence of the association is extending and being extended. Its discussions are marked with earnestness and ability. During the past year fourteen general meetings were held; eleven papers upon subjects of importance were read and considered, all of which were printed and circulated; two reports, prepared by committees specially appointed, were received, one of which, after careful discussion, was formally adopted by the association. Owing to pressure of business it was found necessary, upon more than one occasion, to hold meetings, and to have more than

one paper read on the same evening. Several special committees are now pursuing their special inquiries. Twenty-seven new members were enrolled during the year. Some of the recently elected members are influential public bodies.

There are at present twenty-nine honorary members and two hundred and ninety-six ordinary members. The latter includes eleven corporate members. This feature is a novel one; and we must say we approve of it. Corporate members, representing commercial, manufacturing and educational interests, are specially qualified to render important service to such an association. The bodies whom they represent share, through their deputies, in the deliberations of the association, and are, at the same time, in a position to make valuable communications upon subjects of interest. The association, whose object is the good of the people, is thus mediately brought into connection with the people, and by a species of reflex action the object of the association is directly advanced.

We cannot say too much in praise of such an association. Its conception is laudable, and its existence, as we have already said, is in a civilized community a matter of necessity. We trust that ere long the people of Upper Canada will give a proof of their advanced state of civilization by forming and successfully working an association of the kind. If we have done or said anything to hasten the movement our labor will not be in vain. We can only suggest; others must act. We feel confident that if either encouragement or support be needed from the parent association, the same shall not be wanting.

PROTECTION OF SHEEP.

An act of last session, having for its object the protection of sheep, effects a strange alteration in the substance of the law, to which we would direct attention.

The act contains seven clauses, besides one limiting its application to Upper Canada.

Section 1 enacts that "It shall be lawful for any person to kill any dog in the act of pursuing, or worrying, or destroying such sheep, elsewhere than on land belonging to the owner of such dog."

Sections 2, 3 and 4, provide, that on complaint in writing, on oath, to a justice of the peace, that any person "owns or has in his possession a dog which has within six months worried and injured or destroyed any sheep," such justice may proceed summarily with the matter, and, in case of conviction, may make order for the killing of the dog, and, "on default, may in his discretion impose a fine upon such person not exceeding twenty dollars with costs." Section 5 enacts that no conviction under the act shall be a bar to an action for the recovery of damage done to such sheep; and section 7 enables the defendant in any action for killing a dog under the 1st section, to plead the general issue, and give the act and the special matter in evidence.

The above sections are so worded, we fear, that much doubt will arise as to their true meaning, and some difficulty in proceeding under them; but we do not purpose examining their clauses now. It is with sec. 6 that we are more particularly concerned. It is as follows:—"It shall not be necessary for the plaintiff in any action of damages for injury done by a dog to sheep, to prove that the defendant was aware of the propensity of the dog to pursue or injure sheep, nor shall the liability of the owner or possessor, as aforesaid, of any dog in damages for any injury done by such dog to any sheep, depend upon his previous knowledge of the propensity of such dog to injure sheep."

This, as regards injuries, &c., to sheep by dogs, completely alters the existing law, which is thus laid down, namely, that the owner of domestic animals not necessarily inclined to commit mischief, is not liable for any injury committed by them, unless it can be shown that he previously had notice of the animal's vicious propensity—in other words, in an action against the owner of a dog, for an injury committed by such dog to the person or to personal property, the rule of law is that the *scienter* must be alleged and proved. As the act comes at once into force, and contains nothing express to show that it is not intended to have a retrospective effect, there is more necessity for drawing attention at once to the above provision. The alteration in the rule of law seems to us of doubtful advantage, and exposes every farmer in the community to the danger of loss without misconduct on his part. True, it may be said, why should my neighbour's dog injure my sheep with impunity? But every farmer must keep a dog for his own protection, and dogs are not by nature inclined to kill sheep—in fact not one dog in a thousand will do so, and the rule seemed reasonable enough that the owner should not be held liable unless a mischievous propensity developed itself. Blame can only attach to the owner of a dog when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precaution to protect the public against the ill consequences of those anomalous habits.

It seems strange that the Legislature should do away with a wholesome rule as respects *sheep* only—afford protection to sheep, and not to men. Thus, if a dog worries sheep, it is *not* necessary to prove that the owner "was aware of the propensity of the dog to pursue or injure sheep;" but if a dog grievously bites and wounds a grown-up person or a child, the disposition of the animal to do so and the *scienter* are still the gist of the action.

It is the *knowingly* keeping a dog *accustomed to bite mankind*, that constitutes the liability in case any person

is injured by such animal. And in an action for an injury alleged to be done by a ferocious dog of the defendant, known by him to be of that character, it was held, as most of our readers know, that the plea of "not guilty" put the *scienter* in issue, as well as the *character* of the dog.

Now, without gainsaying the fact that there is a large amount of money invested in sheep, and that a sheep is a very useful and valuable animal, and withal a very gentle creature, we must think that the Legislature, in its anxious care to protect sheep and lambs against ferocious dogs, has lost sight of protection for women and children, to say nothing of men, who might be supposed to be able to protect themselves.

ENGLISH BENCH AND BAR.

Mr. Sergeant Pigott has been appointed a Baron of the Court of Exchequer.

Sir Roundell Palmer, Q.C., has been appointed Attorney-General, in the room of Sir Wm. Atherton, Q.C., resigned, owing to ill health.

The *new Solicitor-General is R. P. Collier, Q.C. His* appointment is well received by the profession.

SELECTIONS.

THE COSTS OF ACTIONS IN THE SUPERIOR COURTS OF COMMON LAW *

Probably no subject with which a lawyer is professionally brought in contact, is so unattractive and even distasteful to him as that of costs. Still its importance is perceived almost without an effort of thought. The expense of bringing and sustaining an action for the vindication of a personal right may be so great, or so capricious in reference to its incidents, as to make recourse to the established tribunals too perilous for the ordinary citizen, and thus, with the highest intelligence and integrity on the Bench, it would happen that the administration of justice between man and man would practically be effected, if at all by extremely rude expedients. Of course this supposition is extreme and beyond all chance of relization, at least in this country, but it serves to point out the kind of impediment which an ill-adjusted system of imposing costs throws in the way of the efficiency of otherwise perfect judicial courts.

Persons unacquainted with the details of legal practice naturally enough imagine that there can be no difficulty in the matter. A. has a claim against his neighbour B, to enforce which he is obliged to seek the aid of a Court of Law. He succeeds in his suit: as a matter of course, in addition to the claim which he has thus established against B, he ought to receive from him reimbursement of the expenses to which he has been driven for the purpose of vindicating his right. Or on the other hand, he fails; it is equally plain that he ought in this case to pay B. the money which resistance to an unfounded claim has entailed upon him.

This theory is, however, little accordant with the facts of practice. Under hardly any circumstances does the award of costs refund to the successful party the whole of the money, which he has been forced to expend in the prosecution of his suit, and not seldom is it that he even fails to obtain this award. How far it may be possible or expedient to give the suitor complete relief in this respect is a grave question not readily to be answered, but it may be safely asserted, that the rules affecting costs in our common law courts are in a most unsatisfactory state of intricacy, and that any principle which may lie at the root of them, is almost concealed from the explorer amid the entanglement due to the combined operation of discordant Acts of Parliament.

A single example will illustrate the condition of our law of costs:—

An action for slander was tried at the Summer Assizes of 1861, wherein the jury found a verdict for the plaintiff, damages 1s.; it subsequently became a question for the decision of the Court of Common Pleas, whether or not the plaintiff was, under these circumstances, entitled to his full costs. The Court adjudged only 1s., and Erle, C. J., gave the reasons for this judgment in the following words:—"I think that the 3 & 4 Vic., c. 24 does not conflict with the statute of James, so as virtually to repeal it, but that both statutes may stand together." [His lordship read the 2nd section of 3 & 4 Vic., c. 24.] "I give that section its full application. The plaintiff in an action for slander has recovered less than 40s.; he is, therefore, to have no costs unless the judge certifies. The judge has certified, and the question is as to the effect of his certificate. I am of the opinion that the effect of it is to take the case out of the previous enacting part of the section, and the plaintiff then has the same right to costs as he would have had supposing the 3 & 4 Vic., cap. 24 had never passed. Then, by the Statute of Gloucester, he would have been entitled to his full costs unless that right was qualified by any subsequent right. His right is qualified by the statute of James, which says that in an action for slanderous words, where the damages are under 40s., the plaintiff shall recover only so much costs as damages (*Evans* v. *Rees*, 30, L. J. C. P. 16, L. O. 9, C. B. n s. 391).

Thus, after hearing a most learned and solemn argument, four of the ablest judges in Westminster Hall felt themselves obliged to take the case out of the operation of a Statute of Queen Victoria, which forbade costs, then to remit it to that of a Statute of Edward I., which gave FULL costs, and finally to put it under a statute of James I., which had the effect of giving the fortunate plantiff one shilling costs! Where can be found any satire upon our system of legal procedure more severe than that which is afforded by this matter of fact piece of burlesque? Surely the time has come for the well considered interposition of the legislature; and as all the law on the subject is the creature of statute, a very legitimate field for consolidation and amendment lies open to the reformer.

It is not difficult to give a tolerably consise, yet comprehensive history of the various enactments, which are at present in force.

Previously to the reign of Edward I. costs of suit were not it seems, given *totidem verbis* to the successful party. Lord Coke (2 Inst. 288) remarks, "by this it may be collected that justice was good and cheap in ancient times." However his lordship's inference is not inevitable, for there is little doubt (Reeve's Hist. Eng. Law, 400) but that it was then the practice for juries to form an estimate of the costs, and to include the sum so arrived at, in the amount of damages awarded by them; moreover, if this estimated sum ultimately proved insufficient to cover the actual costs, the courts used to award *increased costs*. Still wherever, as in real actions, the verdict of the jury did not take the form of damages, no costs could be recovered.

To put things on a more satisfactory footing, the 6 Edw. I., c. 1, commonly known as the Statute of Gloucester, was passed. The first section of this Act gave damages in certain real actions to which they had not before been incident; and the 2nd section provided, "that the demandant may recover against the tenant the costs of his writ purchased together with the

* A Paper by Mr. J. B. Phear, read at a General Meeting of the Society, June 8th, 1863, and ordered to be printed.

damages above said; and this act shall hold place in all cases where the party is to recover damages." The words "costs of writ purchased," were construed to mean all legal costs of suit, (2 Inst. 288), and with this interpretation, the sentence which follows them was held to confer upon the plaintiff in any action whatever, provided he recovered damages no matter how small, a strict right to his full costs of suit, in addition to those damages.

This statute still constitutes the only foundation on which a plaintiff can have his right to costs. It does not, however, embrace every case in which a plaintiff gains his suit; for it has been determined in a somewhat narrow spirit, that where the plaintiff, as in the case of a common informer suing for a penalty, has no right of action vested in him previously to the action being brought, he does not "recover damages" within the meaning of the Statute of Gloucester, and therefore is not included within its provisions, (Pilfold's Case, 10 Rep., 116 a.; *Tyte* v. *Glode*, 7. T. R. 267, and the *College of Physicians* v. *Harrison*, 9 B. & C. 524).

Notwithstanding that relief was thus early given to a successful plaintiff, no measure of it was extended to a defendant until the reign of Henry VIII., when it was enacted (23 Hen. VIII., c. 15), that in certain specified actions only, after non-suit or a lawful verdict against the plaintiff, the defendant should have judgment to recover his taxed costs against the plaintiff. Much of the remaining inequality between the two parties was removed by the 4 Jac. I., c. 3, which gave costs to the defendant, successful by nonsuit or verdict, "*in all actions* whatsoever, wherein the plaintiff might have costs (if in case judgment should be given for him.") There still remained the disability to recover costs imposed by the peculiarity of the wording of 23 Hen. VIII., c. 15, upon defendants in actions brought by executors and administrators in their representative character. This was taken away by the 31st section of 3 & 4 Wm. IV., c. 42, subject to the power of the court or a judge to otherwise order. And finally, the 8 & 9 Wm. 3, c. 11, s. 1, enlarged by 3 & 4, Wm. 4, c. 42, s. 32, placed one of several defendants, who obtains a verdict, or against whom a *nolle prosequi* is entered, in the same position as if the verdict had been in favour of all defendants alike, reserving power to the judge at the trial to relieve the plaintiff from the costs of such defendant, by certifying upon the record that there was reasonable cause for making him a defendant in the action.

So far legislation was confined to dealing with the costs of litigating matters of fact. But either party might defeat the other on a point of law; either the plaintiff or defendant, conceding his opponents facts, might demur to the legal results sought to be deduced from them; and if he succeeded in maintaining his position on that ground, certainly he had as good a right to be reimbursed his costs of suit, as if he had gained his point by disproving allegation of facts. This was at last recognized by the legislature, and the 8 & 9 Wm. III, c. 11 (already referred to), developed by 3 & 4 Wm. IV., c. 42, s. 34, gave the costs of a demurrer to that party in the action in whose favour it was determined.

Thus at last by the united force of the several statutes which have been quoted, and which range in date from the reign of Edward I., to that of William IV. (a period of 555 years) is established, with a still imperfect generality, the right of the successful litigant to the costs, which his adversary has obliged him to incur; namely:—

The right of a PLAINTIFF, whenever he *recovers damages* (excepting he be an informer), and whenever he succeeds on *demurrer*.

The right of a SOLE DEFENDANT, whether one or several persons, whenever he obtains a *non-suit* or *verdict*, in those cases where a successful plaintiff would get costs, subject as against an executor or administrator to the power of the court or judge to otherwise order; and whenever he succeeds on demurrer.

The right of ONE OF SEVERAL DEFENDANTS (in case all do not succeed), whenever he obtains a *verdict* or a *nolle prosequi* is entered against him, subject to the power of the judge who tried the cause, to certify that he was properly made a defendant.

Might not the whole of this series of enactments be advantageously swept away, and a more complete and satisfactory result attained by one or two sections of a consolidating statute?

So much for the costs of the *cause*. The costs of the *issues* are regulated by an entirely different set of enactments.

It might be imagined, from the terms in which the earlier statutes are couched, that the dispute between the plaintiff and defendant, as it appeared in the pleadings, must necessarily be single-headed. And yet this was not strictly the case. A plaintiff could always embrace several counts in one declaration, although the defendant was restricted to one answer to each of them with the additional privilege of being able to divide into parts any count which admitted of being so treated, and then to plead separately to each part. Thus it frequently happened that, by the act either of the plaintiff or of the defendant, or of both, that a plurality of issues between them arose for determination in the same action. If all these resulted in favour of the same party, the state of things was practically the same as if there had been only a single issue, and no difficulty on this account presented itself in the application of the foregoing statutes relative to costs. But it was quite otherwise when some of the issues were found for the plaintiff, and the remainder for the defendant. In the end, the Courts of Queen's Bench and Common Pleas appear to have decided (*Bridges* v. *Raymond*, 2, W. Bl., 800, and *Postan* v. *Stanway*, 5, East 261), that if the plaintiff succeeded on any *one* of the issues thus raised which circumstance gave him a verdict in a distinct cause of action, he was entitled to the costs of the whole cause including in the Common Pleas the costs of the count on which the defendant succeeded, without any deduction on account of those issues on which he had failed, and that the defendant had no right to any costs unless he defeated the plaintiff on all the issues. In the Exchequer, on the contrary, the practice (for there are no reported decisions on the point) showed a more liberal spirit of interpretation; and when the judges, under the powers given them by the 11, Geo. IV., and 1, Wm. IV., c. 70, sec. 11, made the new rules for securing uniformity of practice in the superior courts, they adopted the practice of the Court of Exchequer in this respect declaring that "no costs shall be allowed in taxation to a plaintiff upon any counts or issues upon which he has not succeeded: and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs," (Reg. Gen. H. T. 2, Wm. IV., r. 74.)

A *nolle prosequi* entered upon any counts or any part of a declaration, was put on the same footing as a verdict for the defendant, by 33 sec. of 3 & 4, Wm. IV., c. 42.

The disability under which a defendant laboured of not being able to plead more than one defence to the same cause of action, was for the first time removed by the 4 sec. of 4 Anne, c. 16, which empowered the defendant in any action, with the leave of the court in which it was brought, to plead as many several matters thereto as he should think necessary for his defence. But in order that this multiplication of issues might not be made the means of vexing a defeated plaintiff with unnecessary expenses, the 5th section of the same act gave him the costs of such of these double issues as he was fortunate enough to win at the assessment of the court, except in the case of a verdict on an issue of fact, when the judge who tried it certified that the defendant had reasonable cause for raising it. What result this construction of the statute (arrived at in *Richmond* v. *Johnson*, 7, East 583) produces in practice is not always ascertainable. *Callender* v. *Howard*, 10, C. B. 302, is one of the last reported cases upon the point

and there the learned arguments of Mr. Gray and Mr. Willes was perfectly appalling by their length, by the multitude of cases quoted in them, and the ingenuity with which these are applied. Nearly at the same time, the Court of Exchequer decided in *Howell* v. *Rodbard*, 4 Ex. 309 in direct opposition to the judgment of the Court of Common Pleas in *Callendar* v. *Howard*.

Surely at this stage the legislature might well have interposed to substitute something like method and simplicity in the place of the mass of statutes which have been described. The legislature did step in, and by the 81st section of the Common Law Procedure Act, 1852, after empowering both the plaintiff and the defendant with proper leave to plead double, provided that the "costs of any issue either of fact or law shall follow the finding or judgment upon such issue, and be adjudged to the successful party whatever may be the result of the other issue or issues." A most inadequate enactment and one which has already been held in *Cazneau* v. *Morrice*, 2 Jur. n. s. 139, to apply only to the issues raised in double pleading; in fact it only explains, and does not even repeal the statute of Anne. We have therefore one more Act of Parliament added to our list of those which regulate costs, with very little corresponding benefit.

So far we have been concerned with the general rights to costs—

1st. Of the party who has been successful in the whole suit.

2nd Of the party who has succeeded on one or more of the counts or causes of action, but not on all the counts or causes of action involved in the suit.

3rd. Of the party who has been successful on an issue or issues, but not on the cause of action out of which it arose.

We now come to the class of enactments passed for the purpose of limiting this general right.

It was discovered at an early period that the indiscriminate award of costs to the successful party tended to encourage the bringing of actions on frivolous, though technically rightful grounds, and also favoured the vexatious choice of the higher and more costly in preference to the inferior tribunals. To check this evil the 43 of Eliz. c. 6, was passed which declared that, "if upon any action personal to be brought in any of her Majesty's Courts at Westminister, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same count, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein, in the same court shall not amount to the sum of 40s. or above, that in every such case the judges and justices before whom any such actions shall be pursued shall not award for costs to the party plaintiff any greater or more costs then the sum of the debt or damage so recovered shall amount unto, but less at their discretion."

To explain this enactment it should be remarked that the County or Sheriff's Court of that time had exclusive cognizance (6 Ed. 1, c. 8 *Kennard* v. *Jones*, 4 T. R. 495), of all (see authorities in Com. Dig. County C. 8) personal actions (not being for trespass *vi et armis* or for lands of freehold, &c.) under the value of 40s.; and therefore it became a common device for the purpose of taking the case out of the inferior jurisdiction to lay the damages in the declaration at an amount above that sum. The framers of the statute struck at the root of this mischief by making the certificate of the judge, to the effect that the extra claim was not *bona fide* made, the instrument of taking away the right to costs: in effect they said to the plaintiff, "If you will harass your opponent by coming to the courts at Westminster, when you ought to bring your suit in the County Court, you shall forfeit the right to full costs which success would otherwise give you." It is worth remarking that this statute was not acted upon for 150 years, until C. J. Willes, in *Whith* v. *Smith* (cited in 2 Str. 1232), for the first time gave the depriving certificate, that action being represented as a very paltry one brought for removing sand from Hunslow Heath.

In the following reign it was thought necessary to do something still more stringent towards repressing frivolous actions for verbal defamation, and accordingly the 21 Jac. c. 16, s. 6 enacted, that in all actions for slanderous words, wherever tried, if the jury should assess the damages under 40s., then the plaintiff should recover only so much costs as the damages so assessed amount to, any law, &c., to the contrary notwithstanding.

So things remained in this respect until the 22 and 23 Car. 2, c. 9 was passed, which statute, by the construction of the judges (3 Wils. 322: *Marriott* v. *Stanley*, 1 Man. & Gr. 853), was limited in its application to actions of trespass *quare clausum fregit*, together with the personal actions excluded from the operation of the 43 Eliz. c. 6—namely, actions of assault and battery and those in which title to land came in question. In its treatment of these it differed materially from its great predecessor; for it laid down that if the jury gave less than 40s. damages the plaintiff should not recover more costs, than the damages so found should amount to, unless the judge certified that an assault and battery was proved, or that title to land was chiefly in question. This section of the statute is not now in force, having been expressly repealed by the 3 & 4 Vic. c. 24; but it is necessary to refer to it because of its supposed connection with the 8 & 9 Wm. 3, c. 11, of which Act sec. 4 says, that "in all actions of trespass in any of his Majesty's Court of Records at Westminster wherein at the trial of the cause it shall appear and be certified by the judge under his hand, upon the back of the Record, that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit, any former law to the contrary notwithstanding." It has been held, in *Bowyer* v. *Cook*, 4 C. B. 236, that this merely operated to mitigate the stringency of the 136th section of the 22nd and 23 Car. 2. c. 9, and therefore that the repeal of the latter annihilates both. Obviously the words of the section have no meaning if there was nothing antecedent to them which operated to take away costs in cases where a certificate of wilful and malicious trespass might possibly be given. But were the Court of Common Pleas strictly right in saying the 136th section of the 22 and 23 Car. 2. c. 9, was the only enactment which had this operation? A verdict for less than 40s. in an action for trespass, *quare clausum fregit*, where title to land was not in question, followed by the certificate, pursuant to the 43 Eliz. c. 6, would have the same depriving effect. Of course, if the giving of the certificate is entirely discretionary with the judge as is probably the case, the above decision is practically correct; but still this very indirect mode of repealing an express statute is extremely unsatisfactory.

The 3 & 4 Vict., c. 24, is the only act relating to our present topic which remains to be considered, It repealed, in express terms, the 22 & 23 Car. II., c. 9. sec. 136, and impliedly we must assume, the 8 & 9 Will. III., c. 11, sec. 4; it also took actions of trespass and trespass on the case out of the operation of the 43 Eliz., c. 6. Having done this, the 2nd section enacted, that in actions of trespass on the case, where the plaintiff recovered less damages than 40s., he should have no costs whatever, unless the judge or officer who presided at the trial should certify that the action was really brought to try a right, besides the mere right to recover damages for the grievance complained of in the action, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious. And the third section provided, that nothing in the Act should deprive the plaintiff of his costs in an action for trespass committed by the defendant, after notice not to trespass.

Wilde, C. J., *in Bowyer* v. *Cook*, concisely summed up the effect of this most difficult statute by saying, that "a plaintiff who recovers less damages than 40s., in an action of trespass or trespass on the case, is entitled to no costs unless the judge shall certify that the action was brought to try a right, or that the trespass or grievance in respect of which the action is brought, was wilful and malicious, except where the defendant has had a previous notice not to trespass."

Where there has been this notice, which must be made to appear on the record by suggestion, if necessary, in which case it may be remarked that the costs of an issue on the suggestion, would not fall within any existing enactment, (*Norwood* v. *Pitt*, 5, H. & N. 801), as the Act then does not apply, and no other act operating upon actions of trespass remains, the plaintiff is remitted to his full right under the Statute of Gloucester.

Again, where a certificate has been given under the 2nd section the Act is also rendered inoperative, (*Evans* v. *Rees*, 30 L. J. C. P., 16), and the plaintiff either falls under the scarcely more merciful restraint of the 21 Jac. 1, c. 16, sec. 6, which only gives as much costs as damages, or obtains his full costs.

In all other personal actions, excepting trespass and trespass on the case, where the verdict is for less than 40s. damages, the 43 Eliz., c. 6, still governs the right to costs.

So much for the present state of the legislation upon costs, as defined by the time-honoured quantum of 40s. damages. It certaintly is not so explicit as to render an attempt at simplification undesireable, even if there should be reason for continuing the existence of a limiting point, which has long ceased to have any practical significance.

Let us pass on to the next set of limiting statutes, namely, —the County Court and cognate Acts.

The modern County Court was established in 1846, by the 9 and 10 Vict., c. 95, and the 58th sec. of this act limited their jurisdiction, in respect of the amount in litigation, to cases where the debt or damage claimed is not more than £20. Over some of the cases within the class defined by sec. 58, characterised by certain circumstances of locality mentioned in sec. 128, the county courts were given a jurisdiction concurrent with that of the superior courts, while over the remainder, the county courts obtain exclusive jurisdiction (to use a somewhat incorrect but convenient adjective). Then following the example set by the 43 Eliz., c. 6, though not imitating its simplicity, the 129 sec. proceeded to exclude from the superior courts, on pain of losing costs, not all cases within the new county court jurisdiction, nor even all within its exclusive jurisdiction, but all contracts within the latter, together with so many torts within it as are defined by the circumstance, that the damages do not amount to more than £5.

Why the legislature should have thus attempted to separate actions for contract and tort, it is very difficult to conceive; the more so as they did nothing of the kind when fixing the superior limit of the county court jurisdiction. The learned judges of the Court of Queen's Bench lately, in *Tatton* v. *The Great Western Railway Company* (6 Jur., N. S., p. 800), expressed very strong opinions against the reality of this distinction; and that case illustrated in a remarkable manner the practical difficulty of observing it.

The latter part of the 129th sec., gave costs as between attorney and client to the defendant, in certain cases where the plaintiff did not obtain a verdict, unless the judge certified to the contrary.

This statute expressly left untouched, the question of costs in cases belonging to the concurrent jurisdiction, and impliedly in the case of judgment by default; it also provided, by judge's certificate, for a mitigation of the penalty in the other. However, as there was much practical inconvenience lying in the way of parties who wanted to avail themselves of these advantages, the provisions of this Act upon this point were superseded by the 13 & 14 Vic., c. 61.

The 1st sec. of the 13 & 14 Vict., c. 61, increased the higher range of the county court jurisdiction to £50, but it made no alteration in the £20 and £5 as determining the right to costs in the superior courts, so that cases triable in the county courts may now be separated into three classes:—

First, Those whose circumstances of locality, place them in the concurrent jurisdiction.

Secondly, Those not so distinguished, and where the amount recovered does not exceed £20 and £5, in contract and tort respectively.

Thirdly Those not so distinguished, and where the amount recovered lies between £20 and £50 in contract, and £5 and £50 in tort, inclusive of the latter limit in both cases.

There is no check whatever, provided by this act against bringing class three into the superior courts. If class two, or any resembling them, are brought there, no costs will be awarded unless the judge shall certify on the back of the record that it appeared to him at the trial, that the cause of action was one for which a plaint could not have been entered in a county court, or that there was sufficient reason for bringing the action in the superior court, or unless an order of court or of a judge in chambers be obtained, under the provision of sec. 13, and finally those of class 1, if brought in superior courts, and if only £20 or £5 be recovered, will also be awarded costs by an order under sec. 13, but not by a certificate. It must be added, that this Act expressly exempted judgment by default from deprivation of costs.

Whether the words "judgment by default," here used, are confined to actions of contract, or whether they extend to cases of tort, followed by an assessment of damages on a writ of inquiry is not clear. However as to judgments by default in actions of contract this doubt is now of no importance, for if the amount of damages claimed, and therefore recovered, does not exceed £20, the plaintiff is, by sec. 30 of statute 19 & 20 Vict., c. 108, deprived of costs, unless the court in which the action is brought, or a judge otherwise directs; and it has been held (*Heard* v. *Edey*, 1, H. & N., 716), that the effect of this is to remove default in an action on contract from the above exemption.

Previously to this change, sec. 13 of statute 13 & 14 Vict. c. 61, which provided in certain cases, a release by order of the court or judge from deprivation of costs, was repealed; and sec. 4 and statute 15 & 16 Vict., c. 54, substituted for it.

Thus we have in force four County Court Acts regulating costs in superior courts—one, the 9 & 10 Vict., c. 95, s. 129 giving costs as bewteen attorney and client to a successful defendant; another, the 13 & 14 Vict., c. 61, ss. 11 and 12, depriving a plaintiff of costs who obtains a verdict not exceeding £20 or £5 respectively unless the judge gives a certain certificate; a third the 19 & 20 Vict., c. 108, s. 48, places judgment, by default in the same position as the verdict just mentioned; and the fourth, the 15 & 16 Vict., c. 54, s. 4, enabling the plaintiff, in any of these cases, to get his costs restored to him under certain circumstances, by obtaining an order from the court or judge to that effect.

Analagous to the County Court Acts is the 15 Vic., c. 77, which re-organized the Sheriff's Court in the City of London and made it, in fact, the county court for a Metropolitan district. Secs. 120, 121, and 122, in effect, repeated the foregoing enactments of the County Court Acts relative to deprivation and restoration of costs in actions in the superior courts, merely placing the Sheriff's Court jurisdiction for that of the County Court's, among the facts to be certified by the court or judge, and making the disqualifying verdict "less than," instead of "not exceeding," £20 and £5 respectively. But the 119 sec., which appears to have found its way into the Act in a most unaccountable manner, introduced an additional restraint upon the plaintiff's right to costs. The only meaning that can be given to it (and even this construc-

tion, it may be remarked, renders part of its words superfluous) is, that if a plaintiff in superior courts, in any action on contract, which might with some exceptions, be brought in the city court (whose jurisdiction extends to £50 and is very comprehensive in regard to locality) recover £20, and not more than £50, he will be deprived of costs by the defendant entering a suggestion on the record, unless he obtains the certificate or order prescribed for the relief of the other cases.

Nor are these all the Acts which profess to deal with limited verdicts, for the 23 & 24, Vict., c. 126, s. 34, enacts, that in any action for tort in the superior courts, where less than £5 is recovered, the plaintiff shall have no costs if the judge certifies that the action was not brought to try a right, and that the trespass was not wilful and malicious, and was not fit to be brought. It is remarkable that this section does not place a verdict of exactly £5 under the depriving power of the judge but leaves it to the chance of escaping the forfeiting section of the County Court Act.

The confusion into which matters are thrown by these concurrent Acts of Parliament will be readily perceived from the annexed diagram.

What, after all, is the result aimed at by the voluminous mass of legislation and judicial decision which has been referred to, and imperfectly described? It is nothing more than this;—

1. To give the plaintiff or the defendant, or some of the individual defendants, should the action be brought against more persons than one, accordingly as they respectively succeed in the contest between them, the right to obtain the costs of suit from his opponent.

2. To distribute between the plaintiff and defendant the costs of the respective issues where several are raised by the pleadings to one cause of action, and neither party has succeeded upon them all.

3. To check vexatious litigation by prescribing some test for the purpose of sifting out of the superior courts all actions which either ought not to be brought at all, or might with complete justice have been decided in an inferior court.

In addition to the general legislation upon the subject of costs in the superior courts, which I have attempted to describe, there are many acts directed to the costs of action in special cases, such as actions on judgments, actions for infringement of patents, actions against persons for what they have done *pursuant* to a statute, actions for a debt of which affidavit has been filed under the Bankruptcy Act, actions brought by persons allowed to sue in *forma pauperis*, &c., &c. The length to which this paper has already run prevents me from making more than a passing remark upon one or two of these.

It may be doubted that whether the privilege of suing in *forma pauperis* is now needed under the conditions of modern society. Scarcely a recent instance is known where suits maintained through its aid have not proved vexatious. Perhaps, however, its theoretical propriety may justify leaving the power of granting it in the discretion of the judges.

The favour shown to persons said to be acting in pursuance of a statute is generally misplaced, for in ninety-nine cases out of a hundred, the offender had no notion that he had been erring officially, or under special protection, until he learned the fact from his pleader, and the plaintiff is as often innocently trapped into a useless litigation. But setting aside these considerations, and also the difficulty of practically determining whether the circumstances under which the jury found for the plaintiff entitle the judge to give his certificate there seems no better reason why, in cases of this class, the costs should be in the discretion of the judge, than that they should be in the multitude of others, where the defendant commits the breach of contract or wrong without express malice. Either leave all costs to the decision of the court or judge, as is the practice in the Court of Chancery, or adopt a uniform mode of making them, with as few exceptions as possible, abide the event of the action.

The subjoined draft of a bill will, better than any extended comments on the existing law, show how, I conceive, the matter might be advantageously dealt with by legislation, chiefly in the way of simplyfying and consolidating statutes at present in operation.

It will be observed that I propose to return to the ancient principle of marking out one area only, as the space within which the judicial discretion is to be generally exerciseable. In choosing the limit, I have been guided by the legislature itself, which thought fit to make £20 the substitute for 40s. in determining the new county court jurisdiction. The only reason which I can imagine why tort should be allowed a lower limit in this respect than contracts, if the notion that more difficult questions of law as to liability of the parties may arise in them, notwithstanding the smallness of actual damage, than are involved in the construction of simple contracts. The truth of such a supposition I am not at all disposed to concede; and on the other hand, I should urge the fact that the bulk of frivolous and vexatious actions—those termed essentially attorneys' actions—is to be found amongst those where the damages for a wrong are small. On the whole, therefore, I have come to the conclusion that the exigencies of practice, do not more than the impartiality of theory recommend a distinction in this respect between actions on contracts and actions on torts.

1. The *first* section of the draft bill repeals all existing enactments on the subject (at least as far as I have been able to ascertain them), except those which apply to certain special forms of action, such as *sci. fa.* to repeal letters patent, proceedings in errors, &c.

2. The *second* gives costs to every plaintiff who obtains judgment.

3. The *third* gives costs to every defendant who obtains judgment.

4. The *fourth* deals with the case where there two or more defendants.

5. The *fifth* distributes the costs of issues where several are raised to the same cause of action.

6. The *sixth* provides, however, that in any action on a judgment, and in any other action where the sum recovered does not exceed £20, the plaintiff shall not be entitled to costs if a certain certificate or order to the contrary be obtained.

7. The *seventh* also provides that in case of an action on a debt, of which an affidavit has been filed in bankruptcy, the plaintiff shall not recover costs unless he be declared entitled to them by a certain rule or order; and moreover, that in the absence of such rule or order, he shall be obliged to allow the defendant his costs of suit out of the damages.

There are many objections to this provision, but I have permitted it to appear here because it was advisedly left unrepealed by the last Bankruptcy Act so recently passed. If it be allowed to stand, I think it ought to be so worded as to throw the burden of the certificate the other way, otherwise a suggestion on the roll will be needed.

8. The *eighth* preserves the privilege of suing in *forma pauperis*.

9. The *ninth* interprets the words "action," "plaintiff," "defendant," "person," "judgment," "costs of suit," and in directing that the last shall be estimated and taxed as between *attorney and client*, probably introduces the greatest element of change contained in the bill. Why the successful litigant, when recovering his expenses, should not be permitted to obtain the actual sum to which they amount under legitimate taxation, I have never been able to understand.

10. The *tenth* empowers the judges from time to time to make rules for the more effectually carrying the bill into effect.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 234).

OF THE SPECIAL PROVISIONS RELATING TO THE PROTECTION OF CLERKS AND BAILIFFS, AND TO THEIR PUNISHMENT FOR MISCONDUCT.

PROTECTION OF OFFICERS.

The duties of officers, often complicated and difficult to carry out, bring them constantly in unpleasant contact with suitors; and, taken from the body of the people, clerks and bailiffs cannot be supposed to know the law in all its bearings on their varied duties; so that if liable to vexatious actions for every little error or slip in the performance of their duties, men could not be induced to accept the office. It seems, therefore, but just that they, as other subordinate officers of the law, should be enabled to act without fear. Express provision has been made to protect them from insult, and from personal injury or interference while in the discharge of their duties. The Legislature, moreover, as in the case of constables and other public officers, has provided specially for the reasonable protection of clerks and bailiffs acting in good faith, although they may fall into trifling errors, or commit unintentional wrong. Indeed several of the provisions for their protection are taken from statutes long in force, for the indemnity of peace officers in the performance of their official duties.

Of the clauses in the statute on this subject, some relate both to clerk and bailiff; others relate to the bailiff only, and those acting in his aid. They are nearly all classed amongst the "penal clauses" in the act.

The first in order is section 182, which, while it relates generally to contempts in the face of the court during the actual sittings of a division court, specially refers to officers of the court, and, if nothing more, would show the duty of protecting from insult those who, from their position in court, are under peculiar restraints as subordinate officers. The enactment as to this point provides, that if any person wilfully insults any officer of a division court during his attendance in court, the judge may order the offender to be taken into custody, and may enforce a fine not exceeding twenty dollars upon such offender, and in case of non-payment may commit to gaol for a month.

The enactment in section 183 is kindred in character, and, indirectly at least, bears upon the protection of officers. During the actual holding of the court, every bailiff shall exercise the authority of a constable, with full power to prevent breaches of the peace, &c., in the court-room or building, or places adjacent.

Section 184 relates more particularly to direct assaults upon officers, and the rescue of property seized. It is as follows:—"If any officer or bailiff, or his deputy or assistant, be assaulted while in the execution of his duty, or if any rescue be made, or attempted to be made, of any property seized under a process of the court, the person so offending shall be liable to a fine not exceeding twenty dollars, to be recovered by order of the court, or before a justice of the peace of the county or city, and to be imprisoned for any term not exceeding three months; and the bailiff of the court, or any peace officer, may in any such case take the offender into custody, with or without warrant, and bring him before such court or justice accordingly."

The clerk is not mentioned by name in the section, as the bailiff is, but obviously comes within the meaning, being an officer of the court. The words are, "any officer or bailiff, or his deputy or assistant." The object of the clause is to protect all officers; and as to the rescue of goods, by section 208 all property seized under an attachment against an absconding debtor, is to be forthwith handed over to the custody and possession of the clerk. The design is to make the rescue of any property in the custody of the law penal; and it cannot be reasonably doubted that clerk and bailiff are within the spirit of the enactment.

The enactment in this section is cumulative, and a party assaulting an officer could be indicted for the common law offence. It may here be remarked, that so far as relates to a criminal proceeding, the process of the division court is as much a justification to the officer by virtue of the statute, as a writ of execution out of a *superior court* to the sheriff. Upon an indictment for an assault upon a county court bailiff in the execution of his duty, the production of the county court warrant for the apprehension of the prisoner was held to be sufficient justification of the act of the bailiff in apprehending the prisoner, without proof of the previous proceedings authorizing the warrant, even though the judgment be obtained in the one county, and the warrant sent for execution into a different county.

The county courts in England are similar to our division courts, and section 184 of the Division Courts Act is taken from the 114th of the County Courts Act 9 & 10 Vic. cap. 95, and nearly word for word the same.

It would seem that deputy clerks and bailiff's assistants are within section 184.

CORRESPONDENCE.

Division Courts—Abandonment of excess beyond $100—Effect thereof when less than $100.

To the Editors of the Law Journal.

Gentlemen,—I would ask your opinion on the following point of Division Court practice:

A person has a claim against another, amounting to, say, $110, and he sues in the Division Court, abandoning the excess of $10 above the jurisdiction of the court. In his particulars of claim he charges the defendant with all the items of account, and states that the excess of $10 is abandoned. Supposing that the plaintiff succeeds in proving only such items as amount in the whole to $80, would the judge act correctly in deducting from that sum the excess of $10 abandoned, and giving judgment for $70 only, on the ground that the abandonment of the $10 was equivalent to the crediting of it, and that amount of the plaintiff's credits should be deducted from the amount of proved debits?

I ask this question, having frequently seen causes decided in this way, and being inclined to doubt the correctness of the principle.

If followed out, the ruling would in some cases lead to rather curious results. Suppose the claim were for $180, the plaintiff abandoning $80, and from want of proper evidence he was prevented from proving all but $60. The $80 must still be credited to the defendant, according to the ruling; and the plaintiff, instead of getting a judgment for $60, would have a verdict against him for $20!

Yours, very truly,

Prescott, Oct. 6, 1863. L. E.

[The question is one which will admit of some argument, and the statute might with advantage be more explicit. It is worthy of notice that the only clause in the act which gives an express right to abandon the excess over $100, would appear to apply only to suits against absconding debtors (Con. Stat. U. C. cap. 19, sec. 205). Section 59 of the same act gives the right only by implication, but, taken in connection with the Division Court rule, which may be considered as part and parcel of the act, we suppose the right cannot be questioned.

It may be said that a sum once abandoned cannot be recalled or claimed, and that therefore a plaintiff or defendant, having proved a certain portion of his account, should properly suffer a reduction of the sum abandoned from the amount so proved, as otherwise he would be giving up that which he really never had a right to claim, so far as his evidence went to show. We cannot think, however, that the Legislature intended that this abandonment should be taken in its literal sense, and doing so would clearly in some cases work injustice. We believe that the spirit and true meaning of the enactment is, that a suitor may claim *all he can prove*, not exceeding $100, and that any decision to the contrary is at all events not in accordance with equity and good conscience.—Eds. L. J.]

UPPER CANADA REPORTS.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*)

Merrall v. Ellis et al.

Con. Stat. U. C. cap. 24 sec. 30—Effect thereof—Repleader.

Where plaintiff declared upon a recognizance of bail, dated 6th December, 1854, alleging as a breach that the principal departed from the limits, without being released therefrom by due course of law, and defendant pleaded—1. That the recognizance was entered into before 5th May, 1859, and that afterwards the principal surrendered himself into the custody of the sheriff of the county of Brant, and while in such custody gave and substituted for the recognizance a bond, in conformity with Con. Stat. U. C. cap. 24 sec. 30, which was allowed by the county judge, and so that the recognizance was released and discharged. 2. A similar plea, with the exception that it was stated the allowance was endorsed after the commencement of the action; and plaintiff took issue on the pleas, and stated that he sued not for the cause of action in the pleas admitted, but for the non-performance and breach of the condition of the recognizance prior to the substitution of the bon; to which the defendants rejoined that the alleged non-performance and breach in the replication mentioned are the identical breach and non performance set out in the declaration; on which the plaintiff joined issue; and the jury found a verdict for plaintiff on the first issue, with damages assessed at $1,651 59, and for defendant on the second and third issues; the court made absolute a rule to set aside the verdict, and awarded a repleader, on payment of costs by plaintiff.

Semble, Con. Stat. U. C. cap. 24 sec. 30, which enacts that persons who, before 4th May, 1859, had given bail or security under a writ of *ne exeat* or *ca. sa.*, may surrender themselves into custody, and substitute for their bonds or other security theretofore given, a bond or other security to the effect and amount mentioned in the act, and thereupon the existing bail or security shall be discharged or released, does not destroy a cause of action which had accrued for breach of the condition of the original security before the giving of the substituted security.

This was an action of debt on a recognizance of bail, dated 6th December, 1854. The writ of summons issued on 11th August, 1862.

The declaration alleged that defendants, by recognizance, became bail for one Thomas T. Transom that he should remain at the suit of the plaintiff, within the limits of the gaol of the county of Brant until released therefrom by due course of law, and, in the event of his failing, that they would pay such sum of money, costs, sheriff's fees and poundage as the said Transom was liable to pay on the writ *of ca. sa., on which he had been arrested; that the defendants* justified in due form of law; that the recognizance was duly filed in the office of the Deputy Clerk of the Crown and Pleas in the county of Brant, and notice given to the plaintiff; that the recognizance was enrolled of record; and that Transom was duly admitted to the limits of the said gaol, in pursuance of the recognizance and of the statute. Yet Transom departed from the limits without having been released therefrom by due course of law, and that neither he nor defendants have paid the said sums of money.

The defendants pleaded—1st. That the recognizance was entered into before the 5th May, 1859; that afterwards, and after the passing of the act (Con. Stat. U. C. cap. 24 sec. 30) and before the commencement of this suit, Transom surrendered himself into the custody of the sheriff of Brant, and, while in such custody, gave and substituted for the said recognizance a bond, in conformity with that statute; and, within thirty days from the execution of the bond, procured it to be allowed by the judge of the county court of the county of Brant, and the allowance to be endorsed thereon, which bond is filed in the office of the sheriff of the county of Brant, of all which premises the plaintiff had notice, and so defendants say the recognizance was released and discharged. 2nd. A similar plea, only stating that the allowance of the bond was endorsed after the commencement of this suit.

Replication—The plaintiff takes issue on the pleas and says that he sues not for the cause of action therein admitted, but for the *non-performance and breach of a condition* of the said recognizance made by Transom, prior to the giving and substitution of the bond and the allowance thereof.

Rejoinder—As to so much of the replication as states that the plaintiff "sues not for the cause of action (in the pleas mentioned, was apparently meant, as the replication contained the words "therein mentioned") but for the non-performance and breach of a certain condition of the said recognizance, in the said declaration mentioned, made by the said Transom, prior to the giving and substitution, &c.," that the alleged non-performance and breach, in the replication mentioned, are the identical breach and non-performance

assigned and set out in the declaration, and except as in and by the pleas is admitted, there has been no breach or non-performance of the condition of the recognizance by Transom.

On this the plaintiff joined issue.

The case was tried at Brantford, at the Autumn assizes, 1862, before Richards, J.

The defendants admitted the departure stated in the declaration. The plaintiff admitted that since the departure complained of, and on 4th August, 1862, the defendant in the original action gave the bond produced under the statute, which was allowed by the judge. The judge's certificate was taken as evidence of the allowance. The bond was dated August 4th, 1862, and was made by Transom and the two defendants, jointly and severally, to the sheriff of Brant, in the penal sum of $3,216. The condition was (after reciting that Transom was arrested under a *ca. sa* directed to the sheriff of Brant, to satisfy the plaintiff the sums for damages and costs, with interest, as therein set forth, and that Transom, on 5th December, 1854, gave bail in the said action in due form of law, and hath ever since remained and then was in the limits of the said gaol, under the bail so given; and that being desirous of obtaining the benefit of the statute, had surrendered himself to the custody of the said sheriff, and was in close custody, and, while in such custody, had, with two sufficient sureties, executed the said bond) that if Transom should observe and obey all notices, orders and rules of court, touching or concerning him, or his answering interrogatories, or his appearing to be examined *viva voce* or otherwise, or his returning or being remanded in close custody, and if, on reasonable notice to the now defendants, they should produce Transom to the sheriff of Brant, as provided by the statute, and if Transom should, within thirty days from the execution thereof, procure the bond to be allowed by the judge of the county court of the county of Brant, and such allowance to be endorsed thereon, the bond should be void.

The allowance was endorsed on the bond, as having been made by the county court judge, on the 13th August, 1862.

The jury found a verdict on the first issue, and assessed the damages on the breach at $1,651 59, and for the defendants on the second and third issues.

In Michaelmas Term last *Freeman*, Q.C., obtained a rule *nisi* to set aside the verdict rendered for defendants and to enter a verdict instead for plaintiff, on the ground that the second and third issues were immaterial, and that the second plea shews no defence to the action, as the giving of the bond therein mentioned is not a defence to a breach of the recognizance declared on, or for judgment *non obstante veredicto* for the defendants on the second and third issues, or to set aside the verdict and grant leave to the plaintiff to withdraw the new assignment, and demur to the defendants' pleas, on the ground the pleas are not good in law, and that the issues thereon are immaterial.

Wood shewed cause. His argument was, that the declaration only contained one breach, to which the second plea contained a full answer in point of law, and that the issue on the rejoinder, that the breach mentioned in the replication is the same as that stated in the declaration, was found for the defendant, thus affirming the latter part of the rejoinder that Transom committed no breach of the recognizance, except that justified by the plea. He referred to *Thompson* v. *Lock*, 3 C. B. 540; *Edmonds* v. *Lawley*, 6 M & W. 284, *Miller's case*, 1 W. Bl. 451; *LeMesurier* v. *Smith*, 2 U. C. O. S. 479.

Freeman, Q.C., *contra*, admitted he had no authority for the first part of the rule, which had been inadvertently inserted. But he urged that one or other of the alternatives in the latter part of the rule should be granted. As to the first plea it was untrue, as the evidence shewed and the verdict established, and on that the plaintiff ought to retain the damages given. The second plea, though true in fact, was no defence, unless it could be held that the statute had the retrospective effect of curing a preceding breach of the condition of the recognizance. He did not rely much on the replication as a new assignment, treating it as not very intelligible; but as the second plea could only be sustained by a retrospective construction of the act, it was, he contended, no defence in law, and, therefore, the verdict on it should not preclude the plaintiff from recovering. He referred to *Wame* v. *Beresford*, 2 M. & W. 818, *Baynes* v. *Brewster*, 2 Q. B. 375, *Cooke* v. *Pearse*, 8 Q. B. 1044-1066.

DRAPER, C. J. C. P.—The statute 22 Vic. cap. 33 sec. 7, which is incorporated in the Con. Stat. U. C. cap. 24 sec. 30, reads thus—"Persons who have heretofore (*i. e.*, before 4th May, 1859) given bail or security under a writ of *ne exeat* or *capias ad satisfaciendum* may surrender themselves into custody, or may substitute for their bonds or other security heretofore given under the writ a bond or other security to the effect and amount mentioned in the preceding sections of this act; and thereupon in either case the existing bail or security shall be discharged or released."

The replication which is to both first and second pleas, asserts that the breach of the condition of the recognizance, for which the action was brought, took place before the giving of the bond, and the substitution thereof for the recognizance. That may be so, whether or not the breach took place before the 4th May, 1859 (the day when the 22nd Vic. cap. 33 was passed). It is, nevertheless, a very different question whether the statute was intended to relieve defendants from liability on a recognizance previously forfeited, or only from an unforfeited recognizance, by the subsequent surrender of the debtor, or the substitution of a bond for such recognizance. In either case the replication asserts no new fact, for by the terms of the statute the substitution of the bond discharges the prior security, the breach of which, if it ever happened, must have happened before it was discharged; but it does not state whether such breach occurred before or after the 4th May, 1859. Nor does the rejoinder help, for it merely asserts that there never was more than one breach, but throws no light on the question when it occurred.

I am not satisfied that as between the execution creditor and debtor the allowance of the bond is of any importance. Rendering the original act it would rather seem that the only object and effect of such allowance is to relieve the sheriff from further responsibility If so, both pleas in substance contain the same defence, and the verdict is for the plaintiff on the one and the defendant on the other.

It does not, however, appear on any part of the record whether the breach complained of occurred before or after the 4th May, 1859, and the application of the statute to this case may be found to depend on the question which of these two is the fact relied on, at least there is an opening for the two distinct questions; and we are not, I think, called upon to determine the law on the plaintiff's right of action, before we are distinctly informed on what he relies.

I think, therefore, we should make absolute as much of the rule as relates to setting aside the verdict, and granting a repleader on payment of costs by the plaintiff. He can then demur or reply to the pleas as advised.

See *Plomer* v. *Ross*, 5 Taunt. 387.

CHANCERY.

(Reported by ALEX. GRANT, *Esq., Barrister-at-Law, Reporter to the Court.)*

SCEALLY v. MCCALLUM.

Municipal debenture—Liability of person negociating.

A person negociating the sale of a municipal debenture is not answerable that the municipality will pay the amount secured by the debenture. Where, therefore, a township municipality in pursuance of the Municipal Corporation Act of 1849, passed a by-law for the purpose of granting a loan of money to the Bayham, Richmond and Port Burwell Road Company, and issued debentures thereunder, which were subsequently declared to be illegal in consequence of the road company not having been properly constituted; the court in the absence of any proof of fraud, refused to order one of the directors of the road company to refund the amount paid to him upon the sale of one of such debentures.

The bill in this case was filed by Anthony Scealy against Eliza McCallum, Heman Dodge, Shook McConnel, David Merritt and Sylvester Cook, setting forth that in the years 1853-4 certain persons in Bayham agreed to form a joint-stock company, for the construction of a road in that township, under the act 16 Vic., ch. 190, who took steps to incorporate the company under the name of the "Bayham, Richmond, and Port Burwell Road Company," and that the persons so forming the company fixed the sum of £4000 as the amount necessary for the construction of the road, and John McCallum, deceased, the testator in the bill mentioned was a director and the treasurer of the company, and that the municipality of Bayham believing that the company was duly constituted, passed a by-law for the purpose of loaning to the company the sum of £4000—which by-law was set out at length in the bill. This by-law the plaintiff in his bill contended was void on several grounds set forth in the bill, but which it is not neces-

sary here to state. Nevertheless, in pursuance of the by-law so passed, the municipality issued debentures to the road company, for the £4000 so required, in sums of £500 each, and which the company sold to divers persons, amongst others, one to the plaintiff, which he purchased from John McCallum, deceased, and paid therefor £400 cash; and £10 had been paid to plaintiff on account of the interest thereon; but the municipality refused to make any further payments on account of such debenture, alleging that the by-law so passed, and under which the debenture had been so issued was void. The bill further alleged, that when plaintiff purchased such debenture he fully believed that the debenture was a good and valid security for the sum mentioned in it; also that the company was a duly incorporated company, and that he had no notice that such debenture was void, or that the company was not duly incorporated until long after payment of the money for the debenture, and submitted that under the circumstances the contract for the purchase of the debenture ought to be rescinded, and the money paid by plaintiff refunded to him. That the defendants Eliza McCallum, Heman Dodge, and Shook McConnell were executrix and executors of the last will and testament of the said John McCallum, whose estate, it was alleged, was bound to make good to plaintiff his purchase money so paid for the said debenture. The bill prayed relief accordingly.

The defendants McCallum, Dodge and McConnell answered the bill denying all improper conduct on part of the testator in the sale and transfer of the debenture, and insisting that plaintiff took the same at his own risk, and that under the circumstances appearing there was not any ground for the interference of the court.

Roaf and *Fitzgerald* for the plaintiff.

Blake for the defendants, who answered.

SPRAGGE, V. C.—The cases cited by Mr. Roaf seem to proceed upon the ground of implied representation. When a party applies to another to give cash for a bill of exchange or other instrument he must be taken to represent that it is genuine, and the dealing being with an agent of the party to receive the money was held to make no difference where the representation was by the agent on his own behalf. This point was a good deal considered in *Gurney* v. *Womersley*, (4 E. & B. 133), in which previous cases were reviewed. The agent in these bill transactions is in fact the person dealt with, the principal borrower is not dealt with by the party advancing the money. This case differs from those cited in two respects: one, that the instrument was genuine; the other that McCallum and the other directors of the road company were only dealt with as representing the company. It is not unlike the case put by the Chief Justice Gibbs in *Jones* v. *Ryde* (5 Taunt. 494), that when forged bank notes are offered and taken, the party negociating them is not, and does not profess to be answerable that the Bank of England shall pay the notes; but he is answerable for the bills being such as they purport to be. The testator McCallum negociated the debenture with the plaintiff but no special case is made against him. The one case is made against all the directors, which is shortly, that the road company was not legally formed according to the statute; and that the municipal debenture of the township of Bayham is an invalid instrument. It is not charged that the directors knew that the company was not legally formed, or that the debenture was invalid, or that any representations were made to the plaintiff upon either point. The debenture was sold to the plaintiff, and delivered to him, and he paid the purchase money, which appears to have been applied, with all other moneys received, towards the construction of the road; the contract was completed; the bill asks for its rescission—the equity being simply the fact of the invalidity of the road company and of the debenture and the refusal of the municipality to pay the latter.

I find no precedent for such a bill; and the authorities are against such an equity as that upon which the bill is founded. If the sale had been by the defendants in their individual capacity there would be no such equity. *Wilde* v. *Gibson*, (1 H. L.C. 605) and *Legge* v. *Croker*, (1 B. & B. 506) cited with approbation by all the learned lords who gave judgment in *Wilde* v. *Gibson*, were much stronger cases for relief than this. In the case before the Lords, Lord Campbell adverting to the distinction between a bill for carrying into execution an executory contract, and a bill to set aside a conveyance that had been executed, observes; "With regard to the first, if there be in any way whatever misrepresentation or concealment which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed I apprehend, my lords, that a court of equity will set aside the conveyance only on the ground of actual fraud." This proposition was only qualified in the subsequent case of *Slim* v. *Croucher* (1 DeG. F & J. 518), which was before Lord Campbell, as Chancellor, to the extent that if there is actual representation as to a fact which the defendant had known, and had been actually a party to, and upon the faith of which the plaintiff had acted, his having forgotten the fact, (supposing such a thing proved, though scarcely susceptible of proof), would not relieve him from his liability.

Then does the circumstance that these defendants negociated the debentures as directors of a road company make against them. I think they did negociate them on behalf of the road company; and if so the law of principal and agent will apply to them. If they made expressly or impliedly any representation in regard to their principal, they will be bound by it, if untrue, and if another has acted upon it, even though the agent believed it to be true; but Mr. Story in his book on agency suggests this qualification, that the rule would not, or might not apply if the want of authority was known to both parties: or unknown to both parties; and authority is in favour of this qualification, for if the principal be dead the agent is not responsible for what he does, in the belief that he is still living. This was established in the case of *Smout* v. *Ilbery*, (10 M. & W. 1) in which case Baron Alderson, who delivered the judgment of the court, observed, that in all the classes of cases in which the agent has been held personally responsible; "it will be found that he has either been guilty of some fraud—has made some statement which he knew to be false or has stated to be true what he knew to be false; omitting at the same time to give such information to the other contracting party as would enable him equally with himself to judge as to the authority under which he proposed to act."

Tried by this test I do not think that the defendants made themselves responsible. It is right to consider what is necessarily understood by parties dealing together as the plaintiffs and these defendants did; or, in other words, what was the implied representation. I do not think it can be taken to be more than this, that the debentures were genuine, and that the road company whom they represented was a road company *de facto*. Agents for a company cannot, I think, be intended to undertake for the company, or to represent that all the formalities which are necessary to its being duly constituted have been duly complied with. Neither the agent nor the party dealt with understand this; there is no such implied contract, and in the absence of bad faith there is no reason, and I think no law, to attach personal responsibility in such a case. This, too, is a registered company, and the plaintiff had therefore the same means as the defendants of judging as to its validity if he chose to act prudently. It is intimated in the case of the *Athenæum Life Insurance Company* v. *Pooley*, (28 L. J. Chy. 119), by all the judges who decided the case, that it lies upon the party buying debentures to ascertain all facts essential to their validity. Here the plaintiff either made enquiries, or assumed that everything was correct and regular when he should have enquired; and the loss ought not to fall upon parties as innocent as himself, and who in no way misled him. He seems indeed to have acted on his own judgment, for he took time to consider before he made the purchase, and if he did not ascertain for himself that the debenture was a valid security, he gave the parties reason to believe that he had satisfied himself upon that point. It seems, indeed, that he really had done so, that he had taken legal advice; and he is represented as an intelligent man.

It is agreed on both sides that the debenture is not valid, though believed to be valid at the time by the municipality as well as others; the municipality at first paid interest upon it. In the view that I take of the case it is not necessary to decide whether the road company was validly constituted, for even supposing it not to be so, I think the defendants not liable.

I think the bill should be dismissed with costs.

Harrold v. Wallis.

Injunction—Receiver—Executor—Insolvency.

As a general rule an assignment for the benefit of creditors will be taken as a declaration of insolvency, and equivalent to bankruptcy in England; where, therefore, some of the legatees of a testator filed a bill against his executor and two of the legatees, charging a mal administration and alleging that the executor, subsequently to the death of the testator had made an assignment for the benefit of his creditors, and that he was insolvent, the court, upon motion for an injunction and a receiver, before answer, under the circumstances granted an interim injunction and a receiver notwithstanding the executor denied any mal-administration of the estate, or that his insolvency was the reason for his making the assignment of his estate.

Two of the legatees of the deceased testator Samuel Harrold filed a bill against his executor Wallis, his widow, and his unmarried daughter, alleging, among other things, that the executor had been guilty of mal-administration, and was insolvent, having made an assignment for the benefit of his creditors subsequently to the death of the testator. The bill prayed for an injunction and receiver; and

Hodgins, for the plaintiffs, moved on affidavits, before answer, for an injunction and receiver, conformably to the prayer of the bill.

McGregor, for the defendants, other than formal parties, opposed the motion, on counter affidavits, denying all the material allegations of the plaintiffs, except the making of the assignment.

Spragge, V. C.—The bill is filed by the two sons and the three married daughters of the testator, impeaching the will, as made by undue influence exercised by his wife and by defendant Wallis, who is named sole executor. The defendants are his wife and Wallis, and the unmarried daughters of the testator (the husbands of the married daughters are also defendants). This application is for a receiver; it is grounded on alleged misconduct in the administration of the estate, and upon the alleged insolvency of the executor, evidenced by his having recently, and since the death of the testator, made an assignment for the benefit of his creditors. The misconduct is denied upon affidavit; the alleged insolvency is also denied, and an explanation is offered in regard to the assignment, that it was made to pacify creditors, who it was expected would refrain from suing, upon seeing the amount of the assets; and it is alleged that the estate is more than sufficient, to pay all the debts in full; and there is some evidence in support of this.

I think the weight of authority is in favour of granting the application. In some cases a distinction is made between cases where the personal representative is an administrator, and where he is an executor, the court interfering with more difficulty in the latter case, because an executor is the personal choice of the testator; and mere poverty, there being no misconduct, appears not to be a sufficient ground for the appointment of a receiver. It was so held by Sir William Grant, (Amn. 12 Ves. 5), but he gave no direct answer to the suggestion, "suppose the executor was insolvent." And it was also held by Sir Thomas Plumer in *Howard* v. *Papera*, (1 Mad. 141), that poverty alone was not a sufficient ground; but Sir John Leach held in a subsequent case, *Dangley* v. *Hawk*, (5 Mad. 46), that bankruptcy was a sufficient ground. In the early case of *Middleton* v. *Dodswell*, Lord Erskine (13 Ves. 266), made the order on the ground of insolvency, though misconduct also was charged. In a case two years afterwards before Lord Eldon, *Gladdon* v. *Stoneman*, (1 Mad. 141, n), the order was made on the ground of bankruptcy. The question in that case and in *Langley* v. *Hawk* appears not so much to have been whether bankruptcy was a sufficient ground for the appointment of a receiver, as whether the circumstance of the commission of bankruptcy having issued before the death of the testator, he must not be taken to have intended to commit the administration of the estate to him, notwithstanding his bankruptcy. In *Scott* v. *Becher*, (4 Price, 346,) in the Exchequer, a receiver was granted on the ground of insolvency; and in *Mansfield* v. *Shaw* (3 Mad. 100), a like order was made on the same ground. *Smith* v. *Smith* (2 Y. & C. 353,) is not an authority the other way; the executor and trustee had been a bankrupt some thirty-eight years before, and the case was peculiar in its circumstances. The executor and trustee was himself interested, and the court felt that they could not usefully or properly interfere. Lord Abinger put it thus: "Then when the three trustees have renounced and his sister is dead, what is to be done? He is the only person who can interfere. He must do so for the benefit of others if not for his own." There are no such difficulties in this case. I think as a general rule that an assignment for the benefit creditors must be taken as a declaration of insolvency, and equivalent to bankruptcy in England. The expectation that the estate will be more than sufficient to pay the debts in full, is not in my opinion a sufficient reason for taking the case out of the rule; that was one of the grounds upon which the application was resisted in *Langley* v *Hawk*, and proceedings had been taken to supersede the commission, but Sir John Leach said he must consider bankruptcy, notwithstanding, as evidence of insolvency. This case is stronger for the interference of the court. We have the executors own act, and to that I attach more weight than to the explanation he offers in regard to it.

There is also this in favour of the application, which is noticed in some of the cases as entitled to weight: that the interposition of the court is desired by a great majority of those interested in the estate. The affidavits are conflicting as to the fitness of the executor for his office, and as to his honesty and punctuality, but I proceed upon the grounds that I have stated. The question is whether the circumstances are such that the court ought to interfere for the protection of the fund; I have come to the conclusion that this is such a case.

CHAMBERS.

Reported by Robert A. Harrison, Esq., *Barrister-at-Law.*

Johnston et al v. McKenna.

Ejectment—Judgment in favor of several plaintiffs—Death of one—Issue of habeas within a year—Issue of alias after more than six months—Necessity for revival—Execution of writ.

Held, 1st, That the death of one of two plaintiffs in ejectment after judgment (where, for all that appears, the recovery is joint and survives), does not render necessary a suggestion of the death on the roll in order to support a writ of *hab. fac poss.* for recovery of possession of the premises.

2. That where a writ of *habeas* was issued within one year after entry of judgment, an *alias* writ issued more than six years thereafter was regular without reviving the judgment.

3. That where the sheriff returned to the first writ of *habeas*, that "none came to receive possession," the presumption of relea e of the judgment did not arise in the same manner as if nothing had been done upon the judgment.

4. That the second writ might be executed by the removal from possession of a person who was the widow of a person that claimed under the judgment defendant.

5. That a recovery on the judgment roll for the whole of a lot, when in fact plaintiff proved title to the east half only, is not such an irregularity as to cause defendant to move against the judgment.

6. That the court or a judge would in such a case restrain plaintiff from taking possession of more than he in fact recovered.

7. That plaintiff in this cause having endorsed his writ for the recovery of the east half only, to which he proved title, there was no ground for the interference of either court or judge.

(Chambers, Sept. 12, 1863.)

C. S. Patterson obtained a summons on behalf of Patrick Turley and Abraham Maybee, calling on John Johnston, his attorney or agent, to show cause why the *alias* writ of *hab. fac. poss.* in this cause, and all process had thereon, should not be set aside; and why Patrick Turley, who is now seized of the estate of the Hon. George S. Boulton, whose tenant the above defendant was, and of the legal estate of the lands in question, should not be restored to the possession of the lands; or why the possession should not be restored to the widow of James Williamson, deceased, as the tenant of Turley, or to Abraham Maybee:

1. Because the writ is irregularly issued, the judgment not being revived, although one of the plaintiffs is dead, and although the defendant is dead.

2. Because upwards of six years from the entry of the judgment elapsed before the issue of the writ, and the said John Johnston was not entitled to issue the writ without reviving the judgment.

3. Because the writ was executed against a tenant of Turley's, against whom there was no judgment.

4. Because the writ commands the sheriff to give possession of lot No. 6, in the 7th concession of Murray, to plaintiff; whereas judgment was recovered against the plaintiff, claiming the same lot, in an action of ejectment, brought by plaintiff in this court, against

Abraham Maybee, and which last judgment was subsequent to the judgment in this cause.

By the affidavits filed on behalf of the application, it appeared that the patent of the lot issued to one James Johnston; that the heir-at-law (as it was said by Mr. Ruttan, but the heirship was denied by plaintiff) of the patentee sold this lot to Mr. Ruttan, in the year 1822; that Mr. Ruttan sold the east half of the land to the son of the defendant, in 1834, that Mr. Ruttan, and those claiming under him, have been in possession since about the year 1830 or 1831; that in 1852, the plaintiff commenced an action of ejectment against the defendant for the east half, and another action of ejectment against Abraham Maybee for the west half, to whom Ruttan had conveyed in 1846; that the plaintiff obtained a verdict against McKenna, but failed against Maybee; that the same evidence which procured a verdict for Maybee could have been given in this suit against McKenna, if there had not been some understanding about it (the defence was the Statute of Limitations); that judgment was entered against McKenna on the 16th June, 1863, and a writ of possession issued, upon which the sheriff's return is endorsed—"that no one came to him to show him the tenements, or to receive the possession;" that long before the *alias* writ issued, Wm. Johnston and the defendant died; that the *alias* was delivered to the sheriff on the 21st May, 1863, and re-executed on the 1st June by the east half being delivered to the agent of the surviving plaintiff, the said half being then in the possession of Williamson, who claims title under Sylvester McKenna; that the surviving plaintiff threatens to put the writ in force against Maybee; that Geo. S. Boulton owned the east half when this action was brought, although the defendant was in possession; that Boulton, in 1837, conveyed this half to McKenna, who mortgaged the same, and afterwards gave a deed of it to James Williamson, in 1858, who mortgaged it to John Hughes; and that Hughes assigned the mortgage to Durand, who assigned to Turley.

The title seemed really to be, on the part of the defendant, as follows: Daniel Johnston, assuming to be the heir-at-law of the patentee, conveyed to Ruttan; Ruttan to Patrick McKenna, whose heir-at-law the defendant was; the defendant to Robertson; Robertson to D. E Boulton; D. E. Boulton to Geo. S. Boulton; Geo. S. Boulton to Wm. McKenna; Wm. McKenna to James Williamson, James Williamson mortgaged to Hughes; Hughes assigned to Durand; and Durand assigned to Turley, who, on the application, claimed as mortgagee.

It was alleged that the reason the plaintiff delayed executing his writ of possession was, that an action would be brought against him, and he would be turned out of possession, on the same evidence which defeated him in the suit against Maybee, and that the case was purposely postponed till the witnesses might not be forthcoming.

For the plaintiffs, Meyers stated that the suit against Maybee was not taken to trial by the plaintiff, but by the defendant; that Sylvester McKenna and his wife were the principal witnesses upon whose testimony as to the length of possession the verdict was rendered; and that this evidence was opposed to all that McKenna had always told Meyers. He also gave a full narrative of the proceedings. William Johnson swore he was the heir-at-law of the patentee; that after losing the suit against Maybee, he made up his mind not to proceed for the west half any further; that McKenna applied for a new trial, but was refused it; that he never was aware of any one being on the land till 1837, and that the evidence to the contrary was untrue.

It appeared that Turley had lately commenced proceedings in Chancery, and had perpetuated the testimony given on the trial in Maybee's suit, and was about to get a writ for possession from Chancery, when, as he said, the plaintiff had forestalled him.

Richards, Q. C., showed cause. He argued: 1. The death of one of the two plaintiffs is no irregularity, although no suggestion is *made on the roll of his death, and although his name is still used* as if he were living (Arch. Pr. 11 Edn. 596; *Qourke* v. *The Mayor of Gravesend*, 7 C. B. 777; Con. Stat. U. C. cap. 27, sec. 27). 2. That the death of a sole defendant does not, in ejectment, abate the proceedings; because the writ of possession is against the land, or to deliver possession of the land, rather than against the defendant personally (*Withers* v. *Harris*, L. Ray. 808; Con. Stat. U. C. cap. 27, sec. 39). 3. That it was not necessary to obtain the leave of the court, or of a judge, to issue the *alias* writ, although more than six years had elapsed since judgement was entered, because an original writ of execution had been issued within the year, and returned and filed (*Hall* v. *Boulton*, 3 P. C. Rep. 142). 4. That the plaintiffs, being entitled to possession, had the power to turn out any one in possession of the land, although a stranger to the original defendant; but in this case Mrs. Williamson, who was removed, was in possession under persons deriving title from the defendant. 5. That although, in the separate suits which the plaintiffs brought against the defendant and Maybee, the whole lot was claimed from each defendant, and although the plaintiffs recovered against the defendant for the whole lot, there is no repugnancy in the judgment in Maybee's action being against the plaintiff for the whole lot; that Maybee never was, in fact, in possession of the east half, and there can be no estoppel in his favor against this plaintiff in McKenna's suit, to which he is a stranger.

C. S. Patterson, in reply, argued: 1. The right of a surviving plaintiff to go on in his own name and in the name of a deceased co-plaintiff, only exists where the judgment is joint and the interest of the deceased passes to the survivor, which is not necessarily the case here; for the two plaintiffs may have been tenants in common, in which case the right of the deceased would not accrue to the survivor, but would devolve upon his heir or devisee; and that sec. 34 of the Con. Stat. U. C. cap. 27, does not apply to this case at all, because this co-plaintiff died before this section of the act was passed (*Davy* v. *Cameron*, 14 U. C. Q. B. 483; *Ib.*, 15 U.C. Q.B. 175; *Rex* v. *Cohen*, 1 Stark, N. P. 511; and Tidd's Pr. 8th ed. 1170; *Ib.*, 9th ed. 1119, 1121). 2. As to a sole defendant's death after judgment in ejectment, it does not seem to be decided that it is absolutely necessary to revive the judgment, although it is even here recommended to be proper to do it. 3. That this *alias* has been irregularly issued after the six years; because the plaintiff, never having applied to get the possession under his original writ, as appears by the sheriff's return, must be considered to have abandoned it, he cannot now, to avoid the necessity of a revivor, call in aid this effete process (*Doe d. Reynal* v. *Tucket*, 3 Bad. 773).

ADAM WILSON, J.—As to the death of one of the plaintiffs after judgment and before the issuing of the *alias* writ, it is laid down in Tidd's Pr., 9th ed. 1120, that "It is now settled, that when there are two or more plaintiffs or defendants in a personal action, and one or more of them die within a year after judgment, execution may be had for or against the survivors without a *sciere facias*, but the execution should be taken out in the joint names of all the plaintiffs or defendants, otherwise it will not be warranted by the judgment." And this statement of the law is expressly supported by *Rudt* v. *The Mayor of Gravesend* (7 C. B. 777), and in *Cooper* v. *Norton* (16 L. J. Q. B. 364). The case referred to in Tidd is *Penyer* v. *Brace* (1 Ld. Ray. 244), which was trespass against five persons, and judgment against all. The five bring error; and pending the proceedings in error, one of the five plaintiffs in error dies, upon which the plaintiff in the original suit sued out execution against all five, and it was held that if the writ in error had been certified to the court that it had abated by the death of one of the five, inasmuch as it was, until so certified, a supersedeas of the judgment below, the plaintiff below might have sued out his execution against the four living, and the fifth, who was deceased, without first suing out a *sci. fa.* The argument is stated as follows: "Where a new person shall take benefit by or become chargeable to the execution of a judgment, who was not party to the judgment, there a *sci. fa.* ought to be issued against him to make him a party to the judgment, or in the case of executors and administrators; but where the execution of a judgment is not chargeable or beneficial to a person who was not a party to the judgment, there it is otherwise as where there is a survivorship." In the same case, in 1 Salk. 319, it is added, "There is no reason why death should make the condition of survivors better than before." And Holt, C. J., says that "a *capias* or *fi. fa.* being in the personalty, might survive, and might be sued against the survivors without a *sci. fa.*; otherwise if an *elegit*, for there the heir is to be a contributory." In the same case, in 8 Mod. 338, it is said, "If two plaintiffs recover, and one die before execution, the survivor may take it out without a *sci. fa.*, because he is party and privy to the judgment; and if it should happen that the dead man had released the judgment, the defendant may bring *audita querela*, and be relieved."

In *Withers* v. *Harris*, 7 Mod. s. c., Ld. Ray. 806, judgment in ejectment, upon the terms that there should not be execution till a

year and a half after; and whether this judgment could be executed without a *sci. fa.* was the sole question. Holt, C. J., said, "You may sue out execution in ejectment within a year after judgment, in the name of a defendant who has died within the year, without a *sci. fa.*; because, in the writ *hab. fac. poss.* you do not say against whom the execution is to be had, but it is only to have the possession."

In Adams on Ejectment it is said, "Where a sole defendant in ejectment dies after judgment and before execution, it has been doubted whether a *sci. fa.* is necessary, because the execution is of the land only, and no new person is charged; but the surer method is to sue out a *sci. fa.*"

In *Newnham, jun., v. Law* (5 T. R. 577), one of two plaintiffs died before judgment, but the suit went on to judgment and execution in the name of both of them. The defendant applied to set aside proceedings. The plaintiff surviving sued out a new rule to strike out the name of the deceased from the execution, and to suggest the deceased's death on the roll. Lord Kenyon, C. J.: "This objection should not have been taken by the defendant at all. The plaintiff might have made the suggestion as a matter of course, and he ought not to be permitted to make the amendment. Rule absolute to amend without costs, the defendant's rule being discharged."

In personal actions, then, there is no defect in one plaintiff, as survivor of his deceased co-plaintiff, who has died since judgment, proceeding to enforce that judgment by execution in the names of himself and of the deceased plaintiff; because there is a survivorship in law of the rights of the deceased to the one who is living; and there is no one, in the language of the cases, "to take benefit by or become chargeable to the execution of the judgment."

It is argued, however, by Mr. Patterson, that that is not the fact here, for it does not necessarily follow that the two original plaintiffs had such an interest as would accrue on the death of one to the survivor; that they might have sued under the statute as tenants in common, or in some other capacity, character or interest, which was individual, and not joint; and that by the act of 1851, under which this action was begun, "the names of all persons claiming the property are to appear as plaintiffs, which may apply to separate interests," and that the question at the trial should be (except in certain cases), whether the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and upon such finding, judgment may be signed and execution issue for the recovery of possession and costs, as at present in the action of ejectment, and the said judgment having the same and no other effect than at present.

All this shows rather that although plaintiffs may join personally now (which in effect they did under the former law as fictitious lessors of the fictious plaintiff), the recovery shall be to the same effect and in the same manner under the present law, according to the respective rights and interests of the claimants, as it would have been under the former law by the same persons stating joint or several demises, according to the nature of their estates, so that if joint tenants join now as plaintiffs, they shall recover the entirety; and if tenants in common join, they shall recover in severalty, as they could by proper demises under the old law.

This I take to be the meaning of the statute, for the jury are to say which of the claimants is entitled, and then judgment and execution are to follow, as under the old law. The case of *Davy & Russell* v. *Cameron* supports this view.

Under the old law, tenants in common could not unite in a joint demise. Their proper way was to state their interest in severalty, although each one might state a demise for the entirety (2 Chit. on Plg. 6th ed. 630). Joint tenants could lay a joint demise, but they could also lay individual demises for the entirety. If tenants in common proceeded each in the one action for their undivided shares, the recovery of judgment would show on the face what portion went to each lessor; so that on the death of one, the survivor could not have execution for the share which belonged to the deceased. And if they proceeded in the one action by separate demises for the entirety in each demise, they could only recover according to the fact and nature of their title, and not for the entirety which each claimed; so that here again the recovery would, notwithstanding the larger demand, shows what each lessor was entitled to; so that one, on the death of the other, could not claim the deceased's share. So if joint tenants proceeded on a joint demise, as they might, the recovery would follow the nature of the demise, and show a joint title, which would therefore, on the death of one, devolve entirely upon the survivor, and entitle him, according to the above decisions, to execution for the whole; because it would appear on the face of the record that no one else than himself was to take benefit by or become chargeable to the execution of the judgment. But if joint tenants, instead of joining in the demise, proceeded each on a separate demise for the whole, as they might, this would not entitle each one to a recovery for the entirety, but only to his own particular share, and would amount to a severance of the tenancy, which, appearing upon the record, would prevent the survivor from claiming the entirety or more than his own share upon the decease of his co-tenant.—*Doe dem Raper* v. *Longsdale*, 12 East. 39; *Doe dem Marsack* v. *Read*, 12 East. 57; *Doe dem Brown* v. *Judge*, 11 *East*. 288; *Doe dem Whayman* v. *Chaplin*, 3 Taunt. 120; *Doe dem. Hillyer* v. *King*, 6 Exch. 791; *Doe dem Poole* v. *Goungton*, 1 A. & E. 750; which last case contains some of the above, and many other authorities bearing on the subject.

The conclusion to be drawn from my view of the law is, that the joint claim by two under the act of 1851, and a joint recovery, is evidence of a joint estate and title in the two plaintiffs so recovering; and that a separate right, title or interest, if it existed, should, however the writ was framed, have been found by the jury, and so entered on the record, to show incontrovertibly, for the purposes of execution, that the rights of the plaintiffs were several. In fact, in the absence of such several recovery, I must take the recovery, for the purposes of execution, to have been and to be a joint recovery, and therefore a title which does survive, and to which no other person can take benefit or become chargeable.

This disposes of the first objection, and, from the cases before mentioned, it disposes also of the second.

The third question, I think, is determined by the fact that an execution did in this case in fact issue, and was also returned and filed within the year The sheriff's return, that none came to receive possession, does not, I think, raise the presumption, which want of an execution altogether raised in law, that the plaintiffs had released the judgment. Nothing done upon a judgment might well raise this presumption, but something done upon it could not raise such presumption contrary to the act done.

As to the fourth objection, I think, without determining the abstract right of how far the sheriff may proceed in executing a writ of possession, that he was justified in removing Mrs. Williamson, the actual occupant of the premises; because she was in possession by right of her husband, who did claim title under Sylvester McKenna, the defendant in this action, or those in privity with him. In such a case an action for mesne profits would, under the old law, have been maintainable against her.—*Doe* v. *Whitcombe*, 8 Bing. 46, *Doe* v. *Harvey*, 8 Bing. 239, *Doe* v. *Harlow*, 12 A. & E. 40.

And lastly, that although the plaintiff's recovery is for the whole lot against the defendant, when in fact he proved title only to the east half, and should have recovered for that only, the recovery itself is not regular, although the court will restrain the plaintiff on motion from taking possession of more than he actually proved title to if he offers to exceed that limit, but in this case the plaintiff has not offered to do this, but has limited his endorsation to the sheriff to deliver the east half only, and this is all which the sheriff has delivered.

Upon the whole, I think, therefore, the summons must be discharged, with costs.

Summons discharged, with costs.

In the Matter of Geoffrey Hawkins.

Habeas Corpus—Common Law—Power of judge to issue—Con. Stat. U. C. cap 24 sec. 41—Not applicable to plaintiffs against whom defendants obtain judgments for costs—Form of order of committal when made by junior judge of county court.

Held, 1. That at common law the judges of the Superior Courts of Common Law for Upper Canada have power to direct the issue of writs of *habeas corpus ad subjiciendum* in vacation, returnable either in term or vacation.

2. That a plaintiff against whom a defendant has recovered a judgment for costs only in either of the superior courts of common law or a county court, is not liable to be examined or committed under sec. 41 of Con. Stat U C. cap. 24

Quære. must an order of committal made by a junior judge of a county court, under sec 41 of Con Stat U C. cap 24. on the face of it show the death, illness, unavoidable absence or absence on leave of the senior judge.

Semble. it need not, for the maxim *omnia presumuntur recte esse acta* will be held to apply.

(Chambers September 14, 1863.)

The Sheriff of the united counties of York and Peel brought up the body of Geoffrey Hawkins, under a writ of *habeas corpus*,

dated the second day of September instant (in term time), and issued on a fiat of Mr. Justice Morrison, by which the sheriff was commanded to bring the party before the presiding judge in Chambers, or one of the judges of the Court of Queen's Bench, forthwith, to do, receive and suffer all and singular those things which the said judge should then and there consider of him in this behalf.

The writ was tested in term time, in the name of the Chief Justice of Upper Canada, and marked—

"By Statute 31 Car., *ad faciendum, subjiciendum, recipiendum.*

CHAS. C. SMALL."

and was not signed by any judge.

To this writ the sheriff returned that by virtue of it he had the body of the party, whom he arrested on the third of September, under an order, of which a copy was annexed to the writ, which order was made by the junior judge of the county court of the united counties of York and Peel, for not attending and being examined according to an order and appointment.

The copy of order attached was in a cause in the county court of the united counties of York and Peel, in which Geoffrey Hawkins was plaintiff, and John Kenrick was defendant, and was as follows:

"Upon reading the summons issued in this cause, on the seventeenth day of July instant, calling on the above-named Geoffrey Hawkins (judgment debtor) to shew cause why he should not be committed, pursuant to the statute, for not attending to be orally examined, under the order made in this cause on the eleventh day of June last, before William Mortimer Clarke, Esquire, the examiner named in said order; and the appointment of said William Mortimer Clarke made therein duly served on said Geoffrey Hawkins; and upon reading the affidavit of service of said summons, and the enlargement thereof, made respectively on the twentieth and twenty-ninth days of July last, on the undertaking of said Geoffrey Hawkins, by his counsel, that he would attend before said examiner, William Mortimer Clarke, Esquire, at his office, on Monday, the twenty-seventh day of July last, and Wednesday, the fifth day of August instant, respectively, at three o'clock in the afternoon of the said last mentioned days, and submit to be examined pursuant to said order; and upon reading the several reports of the said examiner, that the said Geoffrey Hawkins again failed to attend on both said last mentioned days; and the several affidavits of John Alexander Kains, to the same effect; and the said summons, by virtue of the said enlargements, being now returnable, and no cause being shewn to the contrary:

"I do order, that the said Geoffrey Hawkins be committed to the common gaol of the united counties of York and Peel (being the counties in which the said Hawkins resides) for the period of thirty days, pursuant to the statute in such case made and provided, for his default in not attending and being examined, pursuant to said order and appointment. And I do order that the sheriff of the said united counties of York and Peel to arrest and commit the said Geoffrey Hawkins accordingly.

"Dated at Chambers, August 7th, 1863.

(Signed) "JOHN BOYD, *J. J.*

"To the Sheriff of the United Counties of York and Peel."

The *habeas corpus* was granted on the affidavit of Mr. Hawkins, to the following effect, so far as it was material to the present decision: that he was the plaintiff in a certain action against John Kenrick in the county court, that Kenrick recovered a judgment against Hawkins in the action for costs of defence and nothing else; that he urged in the county court against his examination that the judgment was for costs only; that an order was made on which he was arrested, that he was the judgment debtor in that action; and that he was arrested on the order referred to.

It did not appear expressly by the return that the judgment was for costs only.

The affidavit on which the writ was granted stated this fact; and perhaps sufficient might have been made out of the order itself to lead to the same conclusion.

Mr. Hawkins, upon the return being read and filed, moved for his discharge upon several grounds, some, if not all of which, but one—viz., that he was entitled to be discharged, upon the ground that he was not liable to be examined or arrested on a judgment for costs only—were overruled at the time.

Robert A. Harrison shewed cause. His argument and the cases relied upon by him appear in the decision of the learned judge who heard the argument.

ADAM WILSON, J.—The question arises on the 41st sec. of cap. 24 of the Consolidated Statutes for Upper Canada. The 287th sec. of the C. L. P. Act of this country, which corresponds with the 60th sec. of the C. L. P. Act (1854) of England, must also be referred to, as well as sec. 160 and some of the following sections of our Division Court Act.

The point raised is of some importance, although not of much difficulty, further than the presumed opinion of the ex-Chief Justice of Upper Canada, then Mr. Justice McLean, hereinafter referred to, intimating his holding a contrary opinion, must necessarily make it so, and I shall be obliged, in vindicating my opinion, to set out the sections referred to at large.

The Consolidated Act for U. C. cap. 24, sec. 41, provides that, "In case *any party* has obtained a judgment in any court in Upper Canada, such party or any person entitled to enforce such judgment may apply to such court, or to any judge having authority to dispose of matters arising in such court, for a rule or order that the *judgment debtor* shall be orally examined upon oath before the clerk of the crown, or before the judge or clerk of the county court within the jurisdiction of which such *debtor* may reside, or before any other person, to be named in such rule or order, touching his estate and effects, *and as to the property and means he had when* the *debt* or liability which was the subject of the action in which judgment has been obtained was incurred; *and* as to the property and means he still hath of discharging the said judgment, and as to the disposal he may have made of any property since *contracting such debt* or *incurring such liability*; and in case *such debtor* does not attend, as required by the said rule or order, and does not allege a sufficient excuse for not attending; or, if attending, he refuses to disclose his property or his transactions *respecting the same*; or does not make satisfactory answers *respecting the same*; or, if it appears from such examination, that *such debtor* has contracted or made away with his property, in order to defeat or defraud his creditors, or any of them—such court or judge may order *such debtor* to be committed to the common gaol of the county in which he resides, for any time not exceeding twelve months; or such court or judge may, by rule or order, direct that a writ of *ca. sa.* may be issued against such debtor, and a writ of *ca. sa.* may thereupon be issued upon such judgment, or in case such debtor enjoys the benefit of the gaol limits, such court or judge may make a rule or order for such debtor's being committed to close custody under the 35th section of this act."

The English C. L. P. Act of 1854 sec. 60—which is, in fact, the same as sec. 287 of our C. L. P. Act—enacts that, "It shall be lawful for *any creditor* who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the *judgment debtor* shall be orally examined as to any and what debts are owing to him before a master of the court, or such other person as the court or judge shall appoint; and the court or judge shall make such order for the examination of such debtor, and for the production of any books or documents; and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act."

But this section of the C. L. P. Act, although corresponding with the above section 41 *in many particulars, is not* the one from which that section has been taken, for this last section is not confined to creditors only, and it goes far beyond the C. L. P. section in many other respects.

The provisions with which it more nearly agrees are to be found in sections 160 and 165 of our Division Courts Act, which are taken *from the County Courts Act of England, 9 & 10 Vic. cap. 95* secs. 98 and 99.

Section 160 of the Division Courts Act enacts to the following effect that "Any party having an unsatisfied judgment or order in any division court for the payment of any debt, damages *or costs*, may procure a summons requiring the *defendant* to appear at a time and place therein named to answer such things as are therein named; and if the *defendant* appears he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt, or incurred the damages or liabilty which formed the subject of the action, and as

to the means and expectation he then had, and as to the means and property he still has of discharging the said debt, damages or liability, and as to the disposal he has made of any property."

Section 165 enacts in substance that if the party so summoned,

1. Does not attend, &c., &c.

4 If it appear to the judge that the party *obtained credit from the plaintiff*, or incurred the debt or liability under false pretences, or by means of fraud or breach of trust, or that he wilfully *contracted the debt or liability*, without having had at the time a reasonable expectation of being able to pay or discharge the same.

5. If it appears to the satisfaction of the judge that the party had, when summoned, or, since the judgment was obtained against him, has had sufficient means and ability to pay the debt or damages or costs recovered against him, either altogether or by the instalments which the court in which the judgment was obtained was ordered; and if he has refused or neglected to pay the same at the time ordered, whether before or after the return of the summons, the judge may, if he thinks fit, order such party to be committed to the common gaol of the county in which the party so summoned resides or carries on his business, for any period not exceeding forty days.

Section 170 authorises the judge to rescind or alter any order for payment previously made against any *defendant* so summoned.

Section 171 authorizes the judge to examine both *plaintiff* and *defendant*, and also any other persons touching the several things hereinbefore mentioned, under certain circumstances, before judgment, and to commit the *defendant* to prison, in like manner as he might have done in case the *plaintiff* had obtained a summons for that purpose after judgment.

Section 172 enacts that no protection, order or certificate granted by any court of bankruptcy for the relief of insolvent debtors, shall be available to discharge any *defendant from* any order of commitment.

Section 173 declares that no imprisonment under the act shall extinguish the *debt* or other *cause of action* on which a judgment has been obtained, or protect the *defendant* from being summoned anew and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this act, or to deprive the *plaintiff* of any right to take out execution *against the defendant*.

Mr. Hawkins contended that under sec. 41, before stated, he was not liable to be arrested, because he was the plaintiff in the action, and judgment had been recovered against him for costs only, and he also maintained that the proceedings were open to several other exceptions which I overruled. He cited the case of *Challin* v. *Baker*, 26 L. T. 206, in support of his view that an arrest could not be made for costs only, and which he contended was applicable to his case, although that was a decision under the English C. L. P. Act, sec. 45, before set out, referring to where a *creditor* obtains a judgment; and although our act, under which the arrest was made, is more comprehensive than that section; for he argued that the true construction of our act does not at any rate enable a defendant to examine a plaintiff or arrest him, when a judgment is for costs only.

Mr. Harrison, *contra*, argued that the Legislature, in sec. 41, by using the expression "any party," did so advisedly, to afford a defendant the very reasonable remedy which he ought to have as well against the plaintiff, as the plaintiff against the defendant, for the discovery of the plaintiff's estate and effects, in order that they may be applied to the liquidation of the costs of the action, which, it must be presumed, have been unjustly imposed upon the defendant by the plaintiff's wrongful proceedings, and which may amount to a large sum, and are at all times of serious consequence to defendants; that the arrest is not for the non-payment of costs —which would be contrary to section 3 of the act—but for the neglect and wilful contempt of the plaintiff to the order of the judge —and that there is a plain distinction between the two cases, of which the decision in *Henderson* v. *Dickson*, 19 U. C. Q. B. 593, is a very excellent illustration: and that the process has not been pressed vindictively against the applicant, for if he will now engage to appear and be examined according to the order of the judge his longer imprisonment will not be insisted on.

Mr. Harrison referred to the decision given below of the ex Chief Justice of Upper Canada, Mr. Justice McLean, in *Meyers* v. *Robertson*, 5 U. C. L. J. 251, determining that the section is not restricted to creditors, and is applicable to those cases in which judgments have been recovered against plaintiffs for costs only.

Mr. Harrison further contended that this writ of *habeas corpus* was not one which could be issued under the 31 Car. II cap. 2, for that act applied to criminal cases only, which this is not; and that the Imperial Statute 56 Geo. III cap. 126, which enables judges of the superior courts to issue and adjudicate upon such writs in vacation, in other cases than those which are embraced in the Statute of Charles, does not extend to, and has never been adopted in this province; that the applicant should, therefore, have applied to the court in term time, as he was arrested while the courts were sitting, or must apply in the ensuing term, if he be then in custody; and he referred to Crowley's case, 2 Swanst 1, as a decision upon this point.

As I entertained very strong doubts upon the power of the judge to commit under the circumstances stated, I bailed the applicant, binding him to appear from time to time before the judge in chambers until the matter was finally disposed of.

The case of *Challin* v. *Baker*, 26 L. T. 106, which was cited by Mr. Hawkins, is as follows:

The defendant in that case was called upon by judge's summons to shew cause why she should not, under the 60th sec. of the C. L. P. Act of 1854, attend before the master and submit to examination as to the debts due and owing to her or accruing due; and why, also, she should not produe all books of account, &c., relating to such debts. The judgment had been obtained in ejectment. Mesne profits were not claimed. A verdict was taken against the defendant, she not appearing, and costs were taxed at £35 13s. 2d.

For the plaintiff it was contended that he having obtained a judgment, was entitled to an order to examine his "judgment debtor."

For the defendant it was contended that the plaintiff was not a *creditor* who had obtained a judgment within the meaning of the section; that although he may become a judgment creditor in respect of his costs, yet the statute only applies to actions in which the plaintiff is a creditor at the time of the action brought; that in fact it refers only to creditors bringing actions for the recovery of debts or pecuniary demands in respect of which they have given credit. Platt, B., said that the statute clearly did not apply to a plaintiff in ejectment, and therefore dismissed the summons with costs.

The case of *Meyers* v. *Robertson*, 5 U. C. L. J. 254, referred to by Mr. Harrison is as follows:

The defendant called upon the plaintiff to shew cause why a writ of *ca. sa.* should not issue against the plaintiff for his contempt in not appearing and submitting to oral examination, in pursuance of an order and appointment, duly made under the 22 Vic. cap. 96 sec. 13, now forming sec. 41 of the Consolidated Act for Upper Canada before referred to.

No cause was shewn by the plaintiff. The defendant applied for the usual order for a *ca. sa.* under the statute. McLean, J., on hearing that the judgment was in favor of the defendant for the costs of defence merely, refused the order, on the ground that no *ca. sa.* could issue for costs only; but he said "he would grant the order for committal of the plaintiff under the statute, and he allowed the summons to be amended and again served for that purpose."

I have considered both of the cases on this particular point to which I have been referred, and while I quite agree with the decision of Baron Platt that under the clause relating to *any creditor* having obtained a judgment, no power is given to a plaintiff in ejectment to proceed by the examination of the defendant, when the recovery is for costs merely, and which equally excludes a defendant from so proceeding for his costs only, because in neither case is the party applying "a creditor who has obtained judgment." I am not called upon to dissent from any opinion of Mr. Justice McLean, because he made no decision that the defendant could examine, and arrest for not submitting to examination, the plaintiff in a case when the judgment had been recovered for costs only, because Mr. Justice McLean pronounced no decision whatever. He simply granted a summons on the plaintiff to shew cause why he should not be committed for contempt—a course which might, and no doubt would have been taken by any other judge, to hear on argument what could be advanced in favor of or against such an application. It does not appear that any order was ever made, and it is quite clear that no opinion was expressed upon the occasion.

There is then no authority contrary to the opinion which I entertain upon the construction to be placed upon the 41st section of this act. And if this section be read in connection with sec. 287, there is a decision expressly in favor of my opinion. Or if it be read with the light of the sections of the Division Courts Act before referred to, it will be manifest that this summary proceeding to enforce the payment of a judgment for costs only cannot be maintained, because every word of these sections applies to plaintiffs as against defendants only, and applies to those cases in the same manner as the 41st section under consideration, where the party proceeded against "contracted a debt or incurred a liability which formed the subject of the action."

I think that this section does, however, apply to other cases than to those where the relation of creditor and debtor strictly exists, for by this section any party who has obtained a judgment may apply to have the judgment debtor examined. Now any *party* is certainly not a word applicable only to creditors. Nor is the expression *judgment debtor* necessarily restricted to those cases *where judgment is recovered for a debt*—as every person who has a judgment rendered against him for a sum of money and costs is properly then, whatever he was before, a judgment debtor. Nor is the word "liability" synonimous with "debt." It may apply to any other cause of action, as for instance, trespass—trover—detinue, &c., where something else is recovered than the costs. And if the act stopped here I should not feel at liberty under this section, unless it is to be controlled by sec. 287, before mentioned, to say that a defendant who had obtained a judgment for costs only, was not a party who might examine the plaintiff as a judgment debtor respecting his estate and effects. But the apparent comprehensiveness of the early part of the clause is very plainly and precisely controlled when it expresses what the subject of the examination is to be—respecting his property and means at the time "when the *debt* or *liability, which was the subject of the action* in which judgment has been obtained against him, was recovered," "and as to the disposal he may have made of any property since *contracting such debt or incurring such liability.*"

The act, although carried beyond the strict case of the party applying having been a creditor, is nevertheless expressly confined to those cases only where *the judgment debtor* had "contracted a debt or had incurred a liability *which was the subject of the action*" in which judgment had been obtained against him, which may perhaps include almost every case in which there is a recovery by a plaintiff against a defendant for some pecuniary amount beside the costs of the action. But it may not include the case of a defendant who has a judgment for his larger set off because it can scarcely be said that that set off was *the subject of the action*, which I understand to mean is the same as *the cause of action*. It certainly, however, does not, in my opinion, extend to any case in which *costs alone* are recovered by a defendant, for, or in no sense can they, as between party and party, be said to be *the subject of the action.*

I think the whole scope of the clause bears this construction, and it emphatically corresponds with the declaration in the third section of the act that, "no person shall be liable to arrest for non-payment of costs," and also with sec. 287 of the C. L. P. Act.

It is true that this arrest is not in form for non-payment of costs, but it certainly is in respect of the non-payment of costs—and the summons and order for Mr. Hawkins' examination, and probably also the summons and order for his committal would, before arrest, have been held by all parties as discharged by a payment of those costs. As no doubt that would have been the effect of a payment, it makes me all the more careful while giving full effect to the distinction between the form and the substance of such a proceeding. We see that the form is strictly within the plain provisions of the law authorising an arrest where such provisions do not authorize an arrest for the substance.

It is noticeable that under the Division Courts Act a plaintiff may examine a defendant where he has a judgment or order *for costs.*

With the express legislative declaration contained in the analogous clauses already mentioned in the Division Courts Act, and with the equally strong inference to be deduced from the language of the 41st section itself, I have no difficulty in saying that in my opinion the defendant in the County Court judgment had not the right to call upon the plaintiff to submit to an examination, nor had the judge of the court below the power to order his imprisonment for not appearing for examination.

I do not however, by any means, say that the judge acted harshly. On the contrary, I think, while he assumed he had the power which he exercised, that he acted with a good deal of forbearance, considering the number of enlargements of the summons which were made to afford the applicant an opportunity of submitting to an examination and to spare himself from the unpleasant duty of committing the plaintiff to gaol, for what must have seemed to him a direct contempt of his order.

It is urged by Mr. Harrison, that the applicant cannot be discharged by any of the judges of the Common Law Courts in vacation, although he may be discharged by the Court of Chancery, or by any judge of that court exercising the functions of the full court, because that court is always open, while the Common Law Courts are open only during the terms.

There is no doubt that the statutes before referred to by Mr. Harrison, and the important decision of Lord Eldon, also referred by him, give much countenance to this doctrine. And that at different times very great doubt existed whether the common law judges really did possess the power of acting upon the writ of *habeas corpus* in vacation, in cases not within the operation of the statute of Charles the Second; but without entering into any argument to meet this assertion of the state of the law, it is quite sufficient for me to say that I find it decided in Leonard Watson's case, 9 Ad. & El. 731, that a single judge does possess such a power at the common law in vacation; and with this decision, which has been acted on ever since, I shall not hesitate to exercise the power until I am corrected by some higher tribunal. It is a power which has been exercised in this province for many years past without doubt or controversy, and I shall not cast doubt upon such a power now. I find that Sir James Macaulay, a judge, beside his great judicial qualifications, quite remarkable for his caution, and most unlikely to assume a power which he did not clearly think he possessed, saying in *Reg* v. *Tubbee*, 1 U. C. Pr. R., Rep. 100. "He would have granted the *habeas corpus in chambers* had it not been found desirable to amend the papers on which the application was founded, and not being able conveniently to remain in chambers until they were corrected, he requested the prisoners attorney to apply to Mr. Justice Burns, who granted the writ, and I know of many other cases of a similar kind before many of the other judges, and I believe it is the well know practice of the Crown office from the enquiries which I have caused to be made there.

My opinion then is, that the superior courts of common law of this province, and the respective judges of these courts, have the like powers of issuing the writ of *habeas corpus* which the superior courts, and the judges of such courts, possess in England, and that the authorities shew that such writs may be issued and may be made returnable before a single judge in vacation at the common law.

The prisoner then being properly before me, I have enquired into the cause of his imprisonment, as I was bound to do, and I find him, in my opinion, illegally in custody, and therefore I discharge him.

This (Mr. Justice Wilson added to the foregoing) was the opinion I was prepared to express, but it was intimated to me if i had no objection, that as the matter was of some importance it might be desirable to have it re-argued before myself and an associate judge. Accordingly I requested his lordship the Chief Justice of Upper Canada to be good enough to attend for the purpose, which, at great inconvenience to himself, whilst preparing his numerous judgments in cases argued during last term, he at once consented to do, as it was a case involving the personal liberty of the subject. The re-hearing has since taken place before the Chief Justice and myself. Mr. Hawkins, assisted by Mr. Doyle, supported the application, and Mr. Paterson opposed it, when the substance of the arguments above mentioned were again advanced, which, I must say, did not at all shake my opinion above stated; and I have now the satisfaction of being fortified in the correctness of my view by the superior judgment and long judicial experience of the Chief Justice of Upper Canada, who is clearly of opinion that under sec. 41 of cap. 24, of the Consol. Stat. U. C., a plaintiff cannot be compulsorily examined or considered as in contempt for not submitting to such examination, or be imprisoned for such contempt upon a judgment recovered by a defendant for costs only.

The Chief Justice is also as clearly of opinion that at common law a judge has the power to issue a writ of *habeas corpus*, and to adjudicate upon it in vacation.

It has not become necessary to determine the other questions of the due service of the proceedings in the court below, or whether the applicant's residence was properly in the united counties of York and Peel, so as to be subject to arrest within these counties; but a new point appeared in the course of the re-hearing which had not been noticed before, being that the order on which the arrest took place was issued by the junior judge, and it nowhere appears under sec. 6, of the County Courts Act, that the senior judge, who is still living, was ill, or unavoidably absent, or absent on leave at the time, which are the conditions necessary to exist to give the junior judge jurisdiction over the county court business; but as it is not necessary to give any opinion on this question for the decision of this case, it is only stated in order that it may not appear the matter has escaped attention. Perhaps the maxim *omnia presumunter rect esse acta*, as the Chief Justice said, may apply, and the general presumption that a person acting in a public capacity is duly authorised so to do.

The general result, as I have above mentioned is, that Mr. Hawkins must be discharged from his imprisonment.

I have only to add that the Chief Justice is in no way answerable either for my language or my reasoning—he has only desired me to express his opinion that the plaintiff was not liable to be examined or committed for, or in respect of costs only, according to his construction of the statutes.

Order for discharge.

Freeland v. Brown.

Judgment—Agreement to pay 12 per cent. interest for forbearance—Denial of same—Summons to stay proceedings.

Where judgment was, on the 28th December, 1860, recovered by plaintiff against defendant for £2,486 14s. 8d. debt, and afterwards defendant made large payments of money to plaintiff, part of which plaintiff alleged he received upon an agreement to pay 12½ per cent. interest for forbearance, which agreement defendant denied. and the facts admitted between the parties went far to establish some such agreement or arrangement, a summons, obtained by defendant (who sought to have all interest in excess of 6 per cent. applied in reduction of the judgment debt), calling upon plaintiff, among other things, to show cause why all proceedings should not be stayed, on a *fieri facias* against the goods of defendant, then in the hands of the sheriff, was discharged with cause.

(Chambers, Sept. 17, 1863.)

Leys obtained a summons for the defendant, calling on the plaintiff to show cause why all proceedings should not be stayed on the *fieri facias* against goods issued in this cause, and why a reference should not be made to the Master to ascertain what amount (if any) remains due on the execution.

This summons was granted, on the affidavit of the defendant, which was to the following effect: that about the 24th September, 1860, he was served with the writ of summons in this cause, by which the plaintiff claimed £2,526 6s. 8d., and interest on £2,466 from the 1st August, 1860, which the defendant swore he believed far to exceed the plaintiff's just and legal claim; that judgment was signed on the 28th December, 1860, for £2,486 14s. 8d. for debt, and £4 7s. 9d. for costs; that he paid to the plaintiff, after the service of the writ of summons, and before judgment, $1,142 44c., for which no credit appears to have been given; that since judgment he paid to the plaintiff $7,600 42c.; that on the 16th April, 1863, a *fieri facias* against his goods was delivered to the sheriff, to levy $4,589 3c. for debt, and $5 for the writ, with interest from the 24th March, 1863; that since the issuing of the *fieri facias* he paid to the plaintiff $2,358 28c.; that by the statement annexed to the affidavit showing the payments made by the defendant in this action, it appears he has satisfied the whole amount of the plaintiff's claim with costs; that he paid the plaintiff his fees; and that notwithstanding such payment and satisfaction, the plaintiff refuses to withdraw his writ from the hands of the sheriff, but insists that the defendant still owes a large sum on the judgment.

The statement referred to commenced with the entry of the judgment on the 28th December, 1860, and admitted the plaintiff's claim at that time to be £2,491 2s. 5d., or $10,364 48c.; so that the questions were only upon the matters which occurred since that time.

The plaintiff made affidavit that he has no personal interest in the case; that his name was used only as a trustee from Mr. Crum, of Scotland, the lender of the money; that a few days after suing out the writ of summons, he agreed with the defendant's attorney to delay proceedings till the 25th October, 1860; that he did so; that he subsequently agreed with the defendant to delay entering judgment till the 1st December, 1860, upon the express condition, which was then agreed to by the defendant, that the defendant would, on or before the 1st November, 1860, pay to the plaintiff interest upon the principal moneys remaining due on the mortgage at the rate of 12½ per cent. per annum up to the said 1st November; that the amount of interest was $946 98c. or thereabouts, but the defendant did not pay the same at the time agreed, but he afterwards made the following payments—November 6th, $400; November 12th, $200; November 16th, $154 64c.; November 22nd, $192 44c., remainder of the said interest: that these sums are all he received from the defendant in the month of November on account of the mortgage; and he distinctly and positively swears that all of these sums were paid on account of interest only, and no part thereof was paid on account of principal due upon the mortgage; and for all these sums the defendant got credit as payments for interest, as before stated, and as he (the defendant) well knew.

The plaintiff also swore that on the 6th and 16th November, the defendant paid into the plaintiff's office the sums of $100 and $95 36c. (both of which sums are included in the defendant's statement as payments made in this cause), but neither of such sums was paid on account of the mortgage, for both of them were paid on account of a judgment against the defendant in the plaintiff's office, and which the plaintiff was then threatening to enforce, in favor of one John Rankin. That after the entry of judgment he was urging payment, when the defendant told the plaintiff he (the defendant) had made arrangements for borrowing money to pay off the whole of the plaintiff's claim. The plaintiff then consented to wait, upon the express condition and understanding that the defendant was to pay interest on the principal secured by the mortgage—the whole of which still remained due, and was admitted by the defendant to be due—at the rate of 12½ per cent., from the 1st November, 1860, until the whole was paid off; and that he should also give additional security; the judgment to stand as collateral security, to be enforced at any time when he made default; to both of which the defendant assented. That in this and in a subsequent agreement, the amount remaining due on the mortgage for principal was $9,866 66c., and upon that sum he was to pay 12½ per cent., and upon that sum he has been charged such rate, and not upon the amount recovered by the judgment. That the defendant afterwards asked the plaintiff to accept of only part of the sum, as he wished to pay off some other debts, and to give him time for the balance, saying that as he was paying such large interest it was a good investment. That the plaintiff consented to do this, on the following terms, to which the defendant agreed: first, that the defendant should reduce the mortgage to $5,000; second, that he should also pay all interest, at the rate aforesaid, from the 1st November, 1860, to 14th October, 1861, and the costs, which amounted to $36 50c.; third, that all present securities should continue to stand for the reduced principal, and for interest thereon at the rate aforesaid, such interest to be payable half-yearly. That in pursuance of this agreement the defendant paid, on the 4th June, 1861, $3,000; and about the 14th October, 1861, $2,673 22c. That immediately on receipt of this last mentioned sum, "I sent to the defendant a written statement, showing $302 still due under his last agreement, requesting payment; a true copy of which statement is annexed, marked B." That the defendant never disputed the correctness of the statement, and subsequently paid this balance as follows: about the 1st November, 1861, $100, and about the 10th November, 1861, $202 20c.; "and I distinctly say the defendant paid the several sums charged for interest in the said statement as interest at the rate mentioned therein, and as he had agreed to do." That he did not receive any money on account of this suit on the mortgage after he received the $202 20c. until he received the $1,000 afterwards mentioned; and, so far as he knows, no money was paid upon such account, excepting $312 50c., which was paid to the plaintiff's then partner about the 4th June, 1862. That after the defendant's return from the old country, he asked the plaintiff to send him a statement of what was due for principal and interest on the mortgage; and the plaintiff sent him one, a copy of which was annexed, marked C. That afterwards, pressing the defendant for payment, the defendant wrote the letter annexed, marked D, stating, among other

things, "I have not $5,500 in cash to pay you, until the money is forthcoming from Chaffey's client." That the defendant paid, on account, $1,000, about the 23rd March, 1863, but he never disputed the correctness of the last statement. That he frequently said the plaintiff's client need not be so urgent for payment of the principal, as he was getting such large interest for his money. That there was justly due on the said mortgage, on the 23rd March, 1863, after giving credit for the $1,000, the sum of $4,540 3c., according to the agreements before mentioned; but the error in addition in statement makes the endorsation of *fi. fa.* $4,589 3c. That the sum of $312 50c. entered in the defendant's statement as paid on the 14th April, 1862, the plaintiff is satisfied, was never paid. That defendant did pay, on the 4th June, 1862, $312 50c., which was the exact half-year's interest due on the 14th April.

Mr. Morris, who was the partner of Mr. Freeland, swore that he only received the one sum of $312 50c., which was on the 4th June, 1862; and that the defendant and himself went over the items of account in the office books of Freeland & Morris, relating to this mortgage, but no omissions were discovered.

The defendant, in reply, put in an affidavit of his own, going into the mortgage transaction previous to the entry of the judgment, not only seeking to open the judgment, but going out of the case made by his former affidavit, and upon which alone the summons was granted, and so far the affidavit was not entertained. Defendant in his affidavit then proceeded to state that the only agreement for the payment of interest that he made with the plaintiff, was the original agreement at the making of the mortgage, and he denied that he agreed to pay interest at the rate of 12½ per cent. up to the 1st November, 1860, or at any other special rate; or that he at that time or any future time agreed to depart from the contract made in 1857, in any shape whatever: that he paid the plaintiff, on the 8th November, $500, instead of $400, as the plaintiff says; and that on the 16th November he paid $250, and not $154 64c., as the plaintiff says; and that he paid all these different sums of $500, $200, $250 and $192 44c. on account of this mortgage. He totally denied that the rate of interest to be paid by him was ever at any time after the making of the mortgage in 1857, made or proposed to be made in consideration of extending the time of payment of the mortgage money, or any part thereof, or that time was ever given him on condition of his paying any extra or increased interest beyond what he was bound to pay under the mortgage. And he further swore that the sums paid to the plaintiff on account of the mortgage, so far as he was concerned, were always paid on account, and not as a settlement to any particular period, or for any particular claim; and that he carefully avoided doing so, always intending to have a full examination into the plaintiff's claim before settlement thereof.

The defendant, in a supplemental affidavit, stated that he paid the different sums of $500, $200, $250 and $192 44c., all on account of interest on the mortgage.

C. S. Patterson, for the plaintiff, showed cause. He contended that although the mortgage was made before the 22 Vic. cap. 85, yet, having been made since the 16 Vic. cap. 80, the defendant could not recover back any payments of interest made exceeding the rate of 6 per cent., nor could he at any time after such payment have claimed them to be allowed in reduction of the principal (*Quinlin* v. *Gordon*, 7 U. C. L. J. 232); that the special agreement spoken of by Mr. Freeland is expressly corroborated by the different statements sent to Mr. Brown, and which are deliberately adopted by him, because, with them in his possession, showing the rate of 12½ per cent. is charged and demanded, he voluntarily made the different payments referred to; that it was not that Mr. Freeland, after receiving money, gives Mr. Brown a statement of how the account stands, but it was that Mr. Freeland first of all rendered an account distinctly claiming the 12½ per cent. interest, and then that Mr. Brown adopted the statement by specially making the payment upon and in accordance with the statement rendered; that perhaps whatever verbal difference there may be between Mr. Freeland's affidavit and Mr. Brown's may not be of any practical importance, because, while Mr. Freeland asserts his right to charge the higher rate, upon the special agreement which he says was made regarding it, Mr. Brown (denying the special agreement) admits he believed and was under the impression that he had to pay the 12½ per cent., according to the mortgage itself, for he thought that that was the rate of interest which was provided for in the mortgage; and that such an arrangement as Mr. Freeland declares was made upon the security of the judgment of the court was not an abuse of the proceedings of the court, but was an agreement perfectly legal, for any rate of interest may be contracted for, and even before the late acts it might have been enforced if it was agreed upon as a consideration for the forbearance of the execution he referred to.—*Smith* v. *Alder*, 1 B & Ad. 603; *Hugh* v. *Jones*, 6 Scott, N. R. 696; C. L. P. Act, p. 269; *Lane* v. *Harlock*, 4 D. & L. 408; *Ib.* 22 L. J., Chan. 985.

Richards, *Q. C.*, in reply, insisted there could be no recovery of so large a rate of interest without a clear bargain to that effect; that the allegation of Mr. Freeland was met by the denial of Mr. Brown; that although the defendant made the payments after the statements were rendered to him, he made them on account generally, because he knew he owed far more than the sums demanded; that Mr. Freeland had no right to appropriate the payments made as he pleased, that being the right of the debtor, and not of the creditor; that he (Mr. Brown) had expressed how they should be applied, viz., upon the debt, and not upon any other claim; that, whether such a claim could be enforced against Mr. Brown or not, admitting that he had made a bargain for such a rate of interest, still it could not be exacted upon a judgment which only bears 6 per cent. interest; and that it was a use, or perhaps an abuse, of the proceedings of the court which would not be allowed.—*Bell* v. *Tidd*, 9 Dowl. P. C. 949; *Ex parte Hodge*, 26 L. J.; Bankruptcy, 67; Arch. Pract. 11 Ed. 403; English Rule, 76 of H. T. 1853.

ADAM WILSON, J.—I do not think it is necessary to determine how far and in what respects the two affidavits differ as to the fact of an agreement having been made for the 12½ per cent. after this action was begun, because I think the collateral and circumstantial evidence which I shall refer to either supports Mr. Freeland's view or corresponds with the defendant's belief and impression that he was in fact paying at that rate.

The plaintiff says the defendant agreed to pay interest at 12½ per cent. to the 1st November, 1860, for the forbearance of entry of judgment until the 1st December, 1860, and that the interest amounted to $946 98c.; and that the defendant afterwards paid, in November, $400, $200, $154 64c. and $192 44c.—$947 8c. The difference between the plaintiff and the defendant, whether the $100 additional paid when the $400 were credited, or the $95 36c. additional when the $154 46c. were credited, is of no kind of importance; for there can be no question but that these two extra sums were paid by the defendant and received by the plaintiff. The plaintiff says he applied them on another claim against the defendant. The defendant says he had no right to do so, but he does not deny that he owed the other claim. There ought not to be any contention about such a sum under these circumstances; for if the defendant has received less credit on this claim than he was entitled to, he must have received more upon another claim than he has got.

Then Mr. Freeland says it was agreed that the defendant should reduce the claim to $5,000, and pay interest thereafter at 12½ per cent. half-yearly upon such reduced amount; and he states that after receiving two large payments on account, there was still a balance against Mr. Brown of $302 21c., which had to be paid to bring the demand down to the $5,000; and that he sent Mr. Brown, in October, 1861, a memorandum to this effect; and that Mr. Brown, in the following month, paid this identical sum of $302 21c., with the memorandum in his possession charging him 12½ per cent.

Then, in April, 1862, a half-yearly payment of interest at 12½ per cent. fell due on the $5,000, which was $312 50c., and Mr. Brown paid this precise sum.

Then, in January, 1863, the plaintiff rendered a further statement, claiming interest at the same rate, making the total at that time, of principal and interest, $5,468 75c., to which, or to some similar demand, Mr. Brown answered, that he had not $5,500 to pay, until the money was forthcoming from Chaffey's client.

I cannot but assume, upon all these facts, that there was and must have been some understanding between the parties as to the rate of interest to be paid.

I am not considering whether the rate is oppressive or not; I am only determining whether a bargain or arrangement of some kind has or has not been made or assented to, by which a particular rate should be paid, without regard to its quantum; and from the best opinion which I can form, I think there has been such a bargain or arrangement.

I had, during the argument of this case, great doubts whether, even assuming that a special bargain had been made for more than 6 per cent., either upon the judgment itself or upon the mortgage with the security of the judgment, it was such a proceeding as would be sanctioned and upheld by the court; but it is clear the contract upon the judgment for a higher rate of interest than 6 per cent. is not illegal; for, while in England 4 per cent. is the rate authorized by statute to be levied on judgments, the rule of court No. 76, of H. T. 1853, provides that in cases where there is an agreement between the parties, more than 4 per cent. interest shall be secured by the judgment. Then the endorsement may be made accordingly to levy the amount of interest so agreed.

If the defendant thinks he can sustain his case, he is not precluded by my opinion. He may either apply for a review to the full court, or take proceedings by *audita querela* to try the facts. The very large sum involved has induced me to examine the whole of the facts in detail, and the result at which I have arrived is, that the summons must be discharged with costs.

Summons discharged, with costs.

COUNTY COURTS.

In the County Court of the County of Elgin, before D. J. Hughes, Esq., Co. Judge.

Stanton and Warren v. McLean.

Attorney's bill—Delivery of bill containing items before action.

In an action on an attorney's bill for costs, where the costs were charged at one lump sum, although the costs as between party and party had been taxed at that sum in the original suit, and no bill of items had been delivered by the plaintiffs to their client. *Held*, that it was not a compliance with the 27th sec. of Con. Stat. of U. C., cap. 35.

This was an action to recover the amount of an attorney's bill.

Pleas—1st. Non-assumpsit. 2nd. No bill of costs delivered one month before action brought pursuant to the statute.

At the trial a bill of costs was proved to have been mailed by the plaintiffs to the defendant in a Common Pleas suit (*McLean* v. *Campbell*), in which the present defendant was plaintiff, and the charge was thus made:—"1862, Feb. 1,—To costs on entering judgment, £40 19s. 3d.; interest up to May 1st, 1863, on costs taxed, £2 11s. 3d.; total, £43 10s. 6d."

It was admitted that this was the only bill delivered to the now defendant.

Horton, for defendant, moved for a nonsuit, because the bill was not a sufficient compliance with the statute, and cited *Drew* v. *Clifford*, 2 C. & P. 69; *Waller* v. *Lacey*, 1 Scott's N. P. 186, 1 M. & G. 54, 8 Dow. 563; *Pigott* v. *Cadman*, 26 L. J. Ex. 134.

Stanton, for plaintiffs, insisted that the statute requires a delivery of a bill stating the costs taxed at that amount, and that a delivery of a bill in that way is a sufficient bill, and that the bill having been once taxed, the statute is complied with, and a further compliance with the statute is superseded by the taxation.

Leave was reserved for defendant to move in term to enter a nonsuit on the objection taken, and a verdict was taken for plaintiffs for £45.

In the following term the motion was accordingly made. The cases cited in argument were those above mentioned. Reference was also made to 7 U. C. L. J. 135.

Hughes, Co. J.—I think the opinion of the editors of the U.C. L. Journal on this subject to be correct, and I feel bound to adopt it. The question involved here was discussed in a precisely similar case in 7 U.C. L. J. 135. The editors of the Law Journal, in answer to a communication over the signature "S. P. Y.," upon the authority of *Drew* v. *Clifford*, 2 C. & P. 69, and *Phillby* v. *Hazle*, 29 L. J. C. P. 370, (which last case I find also reported in 2 L. T. N. S. 433, and in 8 C. B. N. S 647,) state that a bill delivered as this was, "to amount of taxed costs in suit *B. v. C.* $56.53," and "to costs of proving claim in Chancery, *G. v. E.*, $12.80," is not a sufficient compliance with the statute, because it should give the items in detail.

Drew v. *Clifford* is one of the cases which was referred to at the trial by Mr. Horton, and was brought upon the bill of several attornies in copartnership. The bill signed was delivered in the following terms:—"Austin v. Clifford. An action having been brought and judgment obtained, the costs of the action were taxed at £51 13s. 5d." The taxation between party and party was proved. It was held not sufficient to charge the costs of the action brought for the then defendant, by the plaintiffs, as attorneys, in one lump sum, although the costs in that action had been taxed at that sum as between party and party. Lord C. J. Abbott held that the plaintiffs could not recover, for he said, "a bill must be delivered with items, if for no other purpose, at least to shew that the party is not charged for the same thing twice over. I think that this bill charging a sum in the lump is not sufficient."

The reason for this is obvious in another point of view from that put by Lord C. J. Abbott. The 27th sec. of the Con. Stat. of U. C., cap. 35, provides that "no suit at law or in equity shall be brought for the recovery of fees, charges or disbursements, until one month after a bill thereof has been delivered by the party, &c." It does not follow that the costs taxed as between party and party would be necessarily proper to be charged as fees, charges or disbursements as between attorney and client; because there may be, and generally are, disbursements to witnesses included in a bill of this kind taxed as between party and party, which are ordinarily paid by the party himself and not by the attorney, which a party may have a right to recover from the opposite party, and his attorney would have no claim to as against his client. The same remark may apply to fees disbursed to counsel in a case where leading or second counsel has been employed.

I think therefore that the rule for a nonsuit to be entered must be made absolute in this case.

Per cur.—Rule absolute.

DIVISION COURTS.

In the First Division Court of the County of Elgin, before D. J. Hughes, Esq., County Judge.

The Corporation of Vienna v. Marr.

Taxes—Action against defendant as collector.

Held, that the roll not being "certified under the hand of the clerk," defendant was not bound to distrain on the goods of a party assessed.

The claim attached to the summons set forth a plaint wherein plaintiffs sought to recover $26.88 "for that the defendant having accepted the office of collector of taxes for the corporation of the village of Vienna for the year 1861, undertook and promised to perform the duties of said office; that one H. McC. was rated on the roll for that year for $26.88, but defendant neglected to levy the said amount out of the goods in the possession of the said H. McC., although had defendant properly performed the duties of his said office the said amount might have been made, and the plaintiffs have, in consequence, sustained damages to the amount above claimed."

The defendant, being a responsible person, was not required by the corporation, and did not enter into any bond with sureties for the due performance of his duties.

It was provsd that H. McC. had goods in his possession out of which defendant might have levied the taxes; that he seized a waggon which was claimed by the reeve of the village, and he, in his private capacity, forbade the sale of it; that there were other goods out of which defendant might have made the amount. Defendant applied to the council for an indemnity to sell the waggon, which they refused to give.

Defendant returned upon the roll opposite the name of H. McC. "property levied upon and sale forbid by G. Suffel." This return was not made until some time late in the year 1862.

Ellis, for the defendant, objected, 1st, that the plaintiffs had never placed a proper roll in defendant's hands, which would justify his selling the waggon or H. McC.'s other goods. The roll was produced and it was objected that there was no proper certificate of the clerk to the collector, setting forth that that was the roll as the statute (Con. Stat. U. C., cap. 55, secs. 91, 92,) requires. The roll was not certified or signed by the clerk. He also objected that there is a special remedy set forth in the statute (see sec. 177 of the same act,) and that it should have been pursued; therefore no action will lie. He cited *Teefle* v. *Carson*, 1 U. C. L. J. 29, and *Municipality of Whitby* v. *Flint*, 9 U. C. C. P. 449, and insisted further that the word "shall" in the 177 sec. is imperative, even where a bond is given, and cited *Tiernan* v. *School Trustees of Napean*, 14 U. C. Q. B. 15.

Mann, for plaintiffs, insisted that the irregularity in the roll was waived by the collector accepting and acting under the roll and retaining it in his possession for two years without returning it, and cited *Macnamara on Nullities*, 24 & 25, and that there was no equity in a collector acting as the defendant had done, and waiting until the last stage of the proceeding before objecting to the roll. *Wooden* v. *Moxon*, 6 Taunt. 490.

HUGHES, Co. J.—I am quite satisfied that if this plaint had been for the recovery of taxes, assessed against H. McConnell, which the defendant had actually collected and received to the use of the plaintiffs, he would be estopped from setting up the defence of which he has now availed himself, because he could not be permitted, in that case, to set up an irregularity of any kind, whether in the rate itself or in the roll which might have been intended as his authority for collecting, or that there was no by-law legally constituting him the collector, as a defence to the action. But that is not what is complained of by the plaintiffs. It is that the defendant, being their collector, neglected t. levy an amount out of goods in the possession of McConnell, which the defendant had undertaken to collect, although the money might have been made but for the defendant's negligence. The answer to this was, that Mr. Suffel forbade him to sell a waggon he had seized, claiming it as his own, and that the plaintiffs would not indemnify him in selling it, and also that the plaintiffs did not arm him with a properly certified roll as his legal warrant for selling McConnell's goods or goods in his possession.

I think that without a roll properly certified under the hand of the clerk, as required by the section of the statute cited in argument, the defendant was not either authorised or bound to enforce the payment of the sum in question, and that if he had done it he would have been committing an act of trespass for which Mr. Suffel (if defendant had sold the waggon) or Mr. McConnell (if defendant had sold other property) might have successfully prosecuted him at law, because he lacked the legal warrant under which to justify himself.

It was the duty of the plaintiffs either to have armed him with that essential, or to have supplied him with an indemnity. They did neither. The plaintiffs have, therefore, no right to complain that the defendant did not do that which would in itself have been an act of trespass, or to charge that as negligence upon the defendant, the doing of which might have subjected him to an action of trespass, for the want of the very essential which they themselves have not supplied and ought to have supplied.

I dare say the defendant would have sold the waggon if he had not been interfered with, but as it turns out he could not have sold any of the property without making himself a trespasser, and as the plaintiffs did not legally authorise the act which they now complain he ought to have done and did not do, the action, I think, fails, for he was not in law bound to do it.

The cases of *Kipp* v. *Wiggott*, 10 C. B. 35, and *Municipality of Whitby* v. *Flint*, 9 U. C. C. P. 449, bear me out in my opinion upon this point.

Per cur.—Nonsuit.

QUARTER SESSIONS.

In the Court of Quarter Sessions for the United Counties of Huron and Bruce, before ROBERT COOPER, Esq., Chairman.

HELPS, Appellant and ENO, Respondent.

Sufficiency of Notice of Appeal—Sufficiency of conviction under Master and Servants' Act.

Held.—1. That a notice of appeal, stating "that the formal conviction drawn up and returned to the Sessions is not sufficient to support the conviction &c.," is sufficiently particular to allow all objections being raised which are apparent on the face of the conviction or order.

Held—2 That a conviction under the Master and Servants' Act, Con. Stat U.C. cap 75, s. 12, must shew that the person against whom the complaint is lodged was a servant at the time of the conviction or order; that the complaint was, "upon oath," and in what manner the wages are due.

[September 10. 1863.]

The appellant in this case was charged by the respondent before Thomas Holmes, Esq., J. P., with refusing to pay him his wages as a hired servant.

The complaint was laid under the 12th Sect. of Con. Stat. of U. C., cap. 75; the appellant was by Thomas Holmes and other Magistrates sitting with him, ordered to pay the sum of $35, together with costs, within 21 days from date of order.

The order (which was in the form of a conviction) was duly returned to the Sessions and filed.

Appellant's counsel proved his notice of appeal, and it was contended—

First. That the conviction or order did not show that complaint was laid before the Magistrates "upon oath."

Second. That it did not show that at the time of order made the relation of master and servant existed, and without which the Magistrates had no jurisdiction.

Third. That the ordering of the payment of wages might mean others than that of servant's wages within the meaning of the act.

Fourth. That no order can properly be made for payment of wages under said act unless the complainant was in service of master at the time the information laid, and that fact must appear in the order of payment.

Respondent's counsel urged that appellant could not, under his notice of appeal, which was according to the form given by Con. Stat of Can., page 1130, show that the order was defective and not sufficient in law—that the notice was too general, and not sufficiently particular.

R. COOPER, Chairman.—The notice of appeal is according to the form given in Con. Stat. of Canada, page 1130. It strictly follows the act. The words of the form are, "that the formal conviction drawn up and returned to the Sessions, is not sufficient, in law, to support the conviction," &c. I think these words are sufficiently particular to allow all objections being raised to the order or conviction apparent on its face. The respondent is bound to show an order good in law under this notice. I think, therefore, the objections raised by the respondent's counsel cannot prevail, and that all questions as to the validity of the order must be entertained by the Court.

I am of opinion that an order made by a Magistrate, directing the payment of wages to a servant, under the provisions of the act cited in the argument, must strictly comply with all the requirements of that act. Nothing can be left to intendment. It is departing from the common law to give Magistrates jurisdiction in matters properly belonging to civil tribunals. When such jurisdiction is conferred they act strictly within their authority. *Have the Magistrates done so here? I think not. They have not* shown that this respondent was a servant at the time the complaint was made or at the time the order was made. They have not stated that the complaint was made "upon oath" as the statute required, neither have they said in what manner the wages was due. For aught the Court can see the respondent might have been years out of the appellant's service. Suppose he had, could the respondent in this case have brought his former master before a Magistrate *and had him committed for having refused to furnish* "necessary provisions?" If it be conceded he could not, I cannot see how this order can be sustained, because that part of the 12th section of the act referred to, is as applicable to the case before us as the one suggested.

The Court is of opinion that the order must be quashed with costs.

Per cur.—Order quashed.

ENGLISH REPORTS.

QUEEN'S BENCH.—IRELAND.

M'NALLY v. OLDHAM.

Libel—False representation—Justification—"The Black List"—Publication of records.

A party publishing a copy of a judgment does so at his peril; and if the judgment has been satisfied by payment before the publication, and he publishes it as an existing liability, he is liable in an action for libel, and if special damage has followed, in an action for a false representation.

[January 13 and 22]

Demurrer. The first paragraph of the summons and plaint complained that theretofore, to wit, at the time of the committing of the grievances thereinafter complained of, and long before, the plaintiff was in business as a jeweller in the city of Dublin, and was in large trade and good credit in said city; that in the course of his said trade the plaintiff became indebted to one Edward

Johnston in the sum of 157*l.* 4*s.*; that said Johnston recov red a judgment therefor in the court of Exchequer, on the 17th May, 1860; and thereon the plaintiff paid the amount of the said judgment and costs, amounting to the sum of 181*l.* 17*s.* 5*d.*, on the 19th May, 1860. And plaintiff said that during all the time aforesaid, and at the time of the grievance, &c. the defendant was the proprietor and publisher of a periodical commonly called "The Black List," yet the said defendant falsely and maliciously printed and published of and concerning the plaintiff in the defendant's said publication, commonly called the "Black List," and on the 24th May, 1860, long after the said judgment had been satisfied as aforesaid, the words following, that is to say, "24th May, 1860; debtor's name, M'Nally, George; address, College-green, Dublin; trade jeweller (meaning the plaintiff) date, 17th May, 1860; court, Exchequer; amount, 157*l.* 4*s.*; costs, 7*l.* 4*s.* 11*d.*; creditor Edmond Johnston" (meaning thereby that said judgment had been recovered against the plaintiff and was then an existing liability against his estate and effects, and that said Edmond Johnston was then a creditor of plaintiff. And plaintiff said that by reason of such publication the plaintiff's trade and credit were ruined, and the plaintiff thereby became bankrupt, to the plaintiff's damage of 2000*l.* Second paragraph—That being such trader as aforesaid, he, the said plaintiff, was in good credit in his said trade, and at the time of the committing of the grievances, &c., that divers persons, and in particular Joseph Myers and Co., of Birmingham, Prince and Son, of Birmingham, John Nathan, of Dublin, and B. Boam, of London, were in the habit of delivering goods to him in his trade on credit; and that the plaintiff, on the 24th May, 1860, was considered by said persons as a person who might safely be trusted with goods on credit, and was in fact at said time so trusted by them. And the plaintiff was not, on the said 24th May, 1860, and at the time of the committing, &c., indebted to Edmond Johnston in the sum of 157*l.* 4*s.*, or at all, yet the defendant on the 24th May, 1860, falsely and maliciously printed and published, and caused to be printed and published of and concerning the plaintiff a false and malicious libel in the words following (setting out the words above given, with an innuendo that the said plaintiff was on said day a judgment-debtor of the said Edmond Johnston in the sum of 157*l.* 4*s.*, and 7*l.* 4*s.* 11*d.* costs); by reason whereof the said plaintiff had been and was greatly injured in his good name, credit and reputation; and divers persons who had trusted the plaintiff in his trade with goods on credit, and in particular the said persons so named as above, ceased so to do, and withdrew their credit from the plaintiff, to his damage in the sum of 2000*l.* Third paragraph.—The plaintiff being such trader, and in such credit as aforesaid, that at the time of the committing, &c. divers persons, and in particular the said persons in the last paragraph mentioned, were in the habit of trusting the plaintiff in his trade with goods on credit; and the plaintiff was, at the time of the committing, &c. so trusted by them. And the plaintiff was not at said time indebted to one Edmond Johnston in the sum of 157*l.* 4*s.*, or at all, of which the defendant had notice; yet the defendant on the 24th May, 1860, and divers other days and times from thence upon the commencement of the suit, falsely published and represented in writing to the said persons so named as above, and to divers other persons, that the said Edmond Johnston was a creditor by judgment of the plaintiff, and that the said plaintiff was in fact indebted to the said Edmond Johnston in the sum of 157*l.* 4*s.*, with 7*l.* 4*s.* 11*d.* costs, on said day, the 24th May, 1860, although defendant had notice as aforesaid that said debt was paid, by reason whereof the plaintiff was injured in his good name, credit and reputation; and divers persons, and in particular the said persons so named as above, withdrew their credit from the plaintiff, and ceased to consider the plaintiff as a person who might safely be trusted with goods on credit, and refused any longer to deal on credit with the plaintiff, and the plaintiff thereby became ruined and bankrupt to his damage of 2000*l.* Fourth paragraph.—That at the time of the committing, &c. and long before, plaintiff was a trader in the city of Dublin, and in great business as such trader, and at the time of the publication thereinafter complained of, the plaintiff was not indebted in any sum to Edmond Johnston, of which the defendant then had notice; yet the defendant, on the 24th May, 1860, falsely, fraudulently, and maliciously made a false representation in writing to divers traders and others, and amongst others to B. Boam, John Nathan and Joseph Myers and Co., of and concerning the plaintiff, in the words and figures following, that is to say (setting out the words above given and stating that the meaning was that the said Edmond Johnston was a creditor of the plaintiff.) And plaintiff averred that, by reason of the premises said persons, traders and others, withdrew their credit from plaintiff and he became bankrupt, to the plaintiff's damage 2000*l.* Fifth paragraph.—That at the time of the committing, &c. and long before, plaintiff was a trader in the city of Dublin, and in great business as such trader, and at the time of the publication thereinafter complained of, the plaintiff was not indebted in any sum to Edmond Johnston, yet the defendant, on the 24th May, 1860, falsely and maliciously printed and published in writing a false and malicious libel of and concerning the plaintiff, in the words following, that is to say (setting out the words above given, with an innuendo that the said Edmond Johnston was a creditor of the plaintiff), whereby the plaintiff's credit was ruined, and he became bankrupt, to the plaintiff's damage of 2000*l.*

The defendant pleaded, fifthly, for a further defence to all said paragraphs, that the publication and representation in writing by each of said paragraphs complained of was one and the same identical matter and thing, that is to say, the publication in said first paragraph in express terms set forth; and said that, before the said printing and publishing by defendant the said Edmond Johnston, in said paragraph mentioned, duly obtained a judgment in the Court of Exchequer in Ireland against the said plaintiff for the sum of 157*l.* 4*s.* for debt, besides 7*l.* 4*s.* 11*d.* for costs of suit; and said judgment was duly enrolled and of record in said court, and duly registered, and not annulled or satisfied on record at the time of said publication and representation in writing; and said publication and representation in writing was a matter so appearing of record and registered as aforesaid, and not further or otherwise, and was made *bonâ fide* and without malice.

To this defence plaintiff demurred, saying that so far as it was pleaded to the first paragraph of the plaint it did not disclose any defence good in substance, because it admitted the sense imputed in and by the said first paragraph to the publication therein mentioned, but did not justify the publication in the sense in the said first paragraph so imputed; and because the publication of the judgment in said fifth defence mentioned was not the publication of any public judicial proceeding in a court of justice; and because the publication of matter false in fact contained in a record of a court of justice by a person not a party to the record, whereby a party to the record sustained damage, is not in itself lawful or privileged; and because, as it appeared by said first paragraph that the judgment therein mentioned was paid prior to said publication, and the defendant published said judgment as being at the date of the said publication an existing liability against the plaintiff, any privilege for the publication of the record in said defence mentioned was taken away by the facts stated in said first paragraph. And that the said defence, so far as it was pleaded to the second paragraph, did not disclose any defence thereto good in substance, for the reasons already stated with reference to it as pleaded to the first paragraph; and that the said defence, so far as it was pleaded to the the third paragraph, did not disclose any defence thereto good in substance, because said defence admitted that the defendant represented that the plaintiff was in fact indebted to Edmond Johnston on the 24th May 1860, but did not justify the representation in the sense charged in said third paragraph; and because the publication in said fifth defence mentioned was not the publication of any public judicial proceeding in a court of justice; and because the publication by a person not a party to a record of matter false in fact contained in a record of a court of justice whereby another, a party to the record, sustains damage, was not in itself lawful or priviliged; and because inasmuch as defendant had notice prior to said publication that the debt therein mentioned was paid, and yet published said record, having actual notice that the statements in said publication contained were false in fact, any privilege otherwise existing for such publication was thereby lost; and that said fifth defence, as pleaded to the fourth paragraph, did not disclose any defence thereto good in substance for the reasons assigned as grounds of demurrer to said defence as pleaded to the third paragraph; and that said defence, so far as same was pleaded to the fifth paragraph, did not disclose any defence thereto good in substance for the reasons assigned as grounds of demurrer to said defence, so far as same was pleaded to the first and second paragraphs.

S. Walker (with him *Heron*, *Q. C.*), for the plaintiff, in support

of the demurrer.—The justification does not answer the entire charge. It admits the sense imputed to the publication, and does not justify in that sense. The charge is, that the defendant published in the "Black List," not merely that a judgment had been recovered on the 17th May, but that that judgment was, on the 21th May, the date of the publication, an existing liability against the plaintiff. It is no answer to that to say "a judgment was recovered on the 17th, which in fact I have a right to publish:" *White* v. *Tyrrell*, 5 Ir. C. L. Rep. 498; *Edsall* v. *Russell*, 4 M. & Gr. 1090; *O'Connor* v. *Wallen*, 6 Ir. C. L. Rep. 378. Suppose, however, the plea answered the entire charge, if any immunity exists for the publication of a judgment of record, it must be either because it is the publication of the *judicial proceedings of a court of justice, or* because a record is in its own nature a thing so public that a party may safely publish it. But the publication of a judgment is not analogous to the report of a public trial. There is nothing to show in this case that the thing published is of the character which may be published; and the manner and object of publishing it are quite different from the manner and object of publishing the report of a trial: *Dawson* v. *Duncan*, 7 Ell. & Bl. 231; *Andrews* v. *Chapman*, 3 C. & Kir. 289; *Hoare* v. *Silverlock*, 9 C. B. 23; *Lewis* v. *Levy*, 1 Ell. Bl. & Ell. 537. Then, a judgment of record is not a matter of *so public a nature that a party may safely publish it.* The publisher ought to show that he has some interest in the contents of it. The fact of being allowed to get a copy of a document is a very different thing from the right to make that document public: (*Rex* v. *Creevy*, 1 M. & S. 273; *Popham* v. *Pickburn*, 7 H. & N. 891.) *Fleming* v. *Newton*, 1 H. of L. 363, will be cited on the other side, but it is distinguishable. There was no allegation of malice, or of any injury having resulted from the publication in that case. Then also the publication was literally true. The statutes there giving publicity to the record of protests were different from and stronger than the statute 1 & 2 Geo. IV. c. 53, which relates to the record of courts of justice in this country. Lastly, on the facts as they appear in this defence, the publication here was an unfair one. It amounted not only to a statement that a judgment had been recovered, but to a statement that the judgment was in full force on the 24th May, which is translating the thing published to the injury of the plaintiff: (*Lewis* v. *Clement*, 3 B. & A. 702; *Lewis* v. *Walter*, 4 B. & A. 605.) Further, it appears from some of the counts that at the time of the publication the defendant had actual *knowledge that the thing* which he published was untrue, which makes the publication an unfair one.

W. Sidney and *Armstrong*, Serjt., for the defendant.—The defendant had a right to make this publication as a publication of a record of a judment. As a principle every court of justice is open, and the publication of even an *ex parte* application for a criminal information has been held to be justified. It is true, that a regular plea of justification must justify the libel in the sense imputed to it in the innuendo. [HAYES, J.—Perhaps the defence here may be upheld as a plea of excuse.] Then, there is no case showing that the right to publish the proceedings in a court of justice is confined to proceedings openly had: (*Curry* v. *Walter*, 1 B. & P. 525; *Lewis* v. *Levy*, 1 Ell. Bl. & Ell. 537.) *Fleming* v. *Newton*, 1 H. of L. 363, is a strong authority in favour of the defendant. Then, publicity is required not merely for the purpose of showing that there is an existing debt, but also for the purpose of showing the *status* of the party, which may be very important. Under the various Bankrupt Acts, and under the statute 7 & 8 Vict. c. 90, there is express legislative authority for inspecting the various records of the courts upon payment of a fee. *The inspection and exemplification* of the records of the Queen's courts are the common right of the public: (2nd Taylor on Evid. s. 1340.) The fact of knowledge of the alteration of the position of the parties does not take away the privilege of publishing an existing record. The defence in this case is not to be looked upon as a plea of justification to the counts in libel, but as an explanation of the circumstances under which the publication took place. The words here are not defamatory, and no action will lie on them, although special damage is alleged. (*Kelly* v. *Partington*, 5 B. & Ad. 645.) Nor is the publication said to have been of the plaintiff as a trader. The words here do not come within any definition of a libel, and the plaint itself is bad, (*Parmiter* v. *Coupland*, 6 M. & W. 105.) As to the counts for a false representation, the defence is good as to them, and, so far, the objection made on the ground of the defence not justifying in the sense imputed does not apply. They also cited *Re Bagot*, 8 Ir. L. R. 295, *Clarke* v. *Taylor*, 3 Sc. 95: 2 Wms. Saund. 244 (*b*), note *q*.

Heron, Q. C., in reply, cited *Stiles* v. *Nokes*, 7 East, 492.

LEFROY, C. J.—This case comes before the court on a demurrer to the fifth defence. In the course of the argument, the defendant took the course, which was properly open to him, of insisting on the objections which, as he considered, lay to the summons and plaint, and showed that it did not state a good cause of action. The case is one of considerable importance, and concerns the public, or at least a large portion of the public, as well as the plaintiff. The nature of the case and of the defence can be best known, and it is important that they should be correctly known, from a statement of the summons and plaint, and of the defence that has been pleaded to it. In the case there are involved questions of importance, and the result of all is, that we are of opinion, first, that the plaintiff has shown a sufficient cause of action; and, secondly, that the defence pleaded does not state a sufficient ground of either justification or excuse. The action is brought by the plaintiff as a trader, not only alleging that he was a trader of credit, but specially stating particular persons with whom it was of importance that his credit should be maintained—persons who supplied him with goods (naming them) upon credit, After that general statement as to his credit generally, and as to the persons whom he named, who were induced, by this publication to withdraw from him the credit they had therefore given, it goes on to state, that on the 24th May, the defendant published of and concerning him a false and pernicious libel, stating the publication as of the 21th May, which will be found important; and what is also material, stating it to have been made in a document known as the "Black List," a very significant term and one fairly to be adverted to on *the principle that, though this comes before the court now upon a* consideration of the pleading, the law is perfectly settled that, with respect to the meaning of language, the court is to exercise the same judgment that individuals would do with respect to the meaning of terms where they are not affected by an innuendo so as to change the ordinary meaning. Well, having thus stated and given that denomination to the publication, he goes on to say: [His Lordship read the words complained of, the innuendo, and the rest of the first count.] This charge is repeated through four other counts, as we used to call them, or paragraphs, as is now the appellation to be given to them, *with different* circumstances of more or less aggravation. One of those circumstances is, that the plaintiff was, in consequence of this publication, driven to bankruptcy and to ruin. Another circumstance of aggravation is the allegation, that the defendant knew that this representation, that the plaintiff was on the 24th May a judgment-debtor of Johnston's was false. I now come to the defence which is pleaded to this summons and plaint, making this preliminary observation, that the action is brought by this party, as a trader, for the injury done to him in his trade. Another observation important to make is, that he has, by the innuendo, alleged the meaning in which these terms were used and applied by the publication, and in which meaning, if the defendant has any justification or excuse, he must justify or excuse the terms he has made use of. Upon that principle of law we are all agreed, and as to it we have, I must say, the candid and proper admission of the counsel for the defendant. It is said that the innuendo cannot be used to make actionable words which otherwise would not be so. That I shall have to consider afterwards; but I proceed on the defence which has been pleaded. *[His Lordship read the fifth defence.]* Here, the defendant states as his defence, that at the time of publication, namely, on the 21th May, there was a judgment standing against the plaintiff; that he published this judgment as it stood on the record; and that, as it stood on the record, it was not annulled or vacated: but he does not deny the allegation in the count that the judgment had been previously paid off, and therefore was, in substance and reality, annulled; whereas it is here held out to the public that, at the date of this publication, namely, on the 21th May, this plaintiff was a judgment-debtor upon a judgment duly enrolled, upon which, therefore, execution might have been at any moment *issued against* this trader. He thus passes by without traversing the allegation that, previously to the 24th May the judgment had been, in truth, annulled by payment, which operates as complete a vacancy of the judgment as if it had been vacated on the record. He, therefore,

in justifying himself as he does, by arguing that he had a right to publish this as a part of the record, and part of the proceeding in a court of justice, omits a very important matter. He would have been justified if he had published the judgment as it stood in reality, as a judgment annulled and satisfied, but if, instead of that, if, instead of availing himself of a legal right, which none of us mean to question, the right of publishing a judgment, a true copy of a judgment, so long as the party does not add a sting to it; if he adds the sting, that it is an unsatisfied judgment, this becomes an exercise of a legal right, with an addition which makes that injurious to the plaintiff in a way that it would not have been if he represented the truth of the transaction. Well, the other counts allege, and no answer is given to the allegation, that the party knew, and was apprised that the judgment was paid off. To that he gives no answer. If the representation was false, made of a trader, the party made it at his peril, whether he knew of the falsity or not, and the peril has been realised in this case; for the allegation undenied is, that the persons whom the plaintiff was in the habit of getting credit from withdrew that credit, the consequence of which was, that he was driven to bankruptcy and ruin. Then the question arose whether this summons and plaint discloses a cause of action. The defendant states at the outset that this is no libel, because, looking to the definition of a libel given by Parke, B., in *Parmiter* v. *Coupland*, 6 M. & W. 105, the language here used was not defamatory. Why, to be sure, if the language is not defamatory, and no innuendo is added, the party cannot sustain an action. But this is not a declaration for an injury arising from defamation of the trader's character, but it is a declaration by a trader for a libel affecting his credit, and though that is attempted to be met by saying that the allegation complained of was made "*bona fide*, and without malice," the facts being admitted, the party cannot avail himself of these general words in order to screen himself from the consequence of the act which it is admitted he has done. But suppose the publication not to be a libel in the strict sense of the word, still, under the C. L. P. A., a party is allowed to add to his declaration an action on the case for a false representation of him as a trader in respect of his trade, from which representation an injury has resulted, and I apprehend there can be no doubt that an action on the case will lie for a false representation made respecting a trader and his circumstances, when it produces an actual injury, if the injury is admitted. It is a *damnum cum injuria*, and therefore, even admitting the objection that this is not strictly speaking a libel, that it is not stated with all the strictness that would become the statement of a libel, the publication is, at all events, a representation, stating of a man in his trade a circumstance which has, upon the admission on the face of the pleading, brought ruin and bankruptcy upon him. It cannot be doubted that that is a cause of action, though the case should fail on technical grounds as a charge of libel. It is argued on the authority of a case from Scotland which came before the House of Lords, that this publication is justified. The Scotch case came before the court upon an application for an injunction. The application was made in Scotland under a jurisdiction which belongs to the courts of that country, to enjoin a party from the publication of a matter which the court deems libellous. The judgment in Scotland was to prevent the publication of the matter which the party justified himself in publishing, because it was published under the authority of an Act of Parliament, by which a record was made of persons in trade who suffered their bills to be protested, and there was authority given by the Act for the benefit of the liege people to publish the list of the merchants or other persons who thus suffered bills to be protested. There was a publication accordingly as against the plaintiff, as having let his bill be protested. The justification so pleaded was held insufficient. There was an appeal to the House of Lords, and the decision of the Scotch court was there overruled, on the ground that this was a publication justified by law and allowed by statute, and accordingly that case was attempted to be pressed into service here, because it is by law allowed to a party to go to the record and get a copy of it, and it was said, I think truly and properly, that he had a right to publish the record of that judgment, and if he had published it as it stood on the record simply, it would have brought him within the protection of the Scotch case, because then he would have published it as it really existed, but forgetting altogether that, he thought he might have published it as it appeared to exist on the record, and added to it that which did not appear on the record, and gave it a sting, which deprived the party who had paid off the judgment of the benefit of his payment, the effect of which was to annul the judgment, and not to leave it, as it was published to be, an existing liability. The proceeding in Scotland of the protest being published was the publication of a truth, for the party had suffered his bill to be protested, and I may observe, even to allow that publication an express Act of Parliament was required; and the party could only have the protection of that Act of Parliament by publishing according to the Act, that is, according to the truth of the transaction that there was a protested bill at the date of the publication. But here it is published that on the day of publication there was a judgment unannulled, with an existing liability upon it, and though there might have been a right to publish the judgment as it stood, there was no right to add to it the sting which gave it all its pernicious consequence, namely, that it was a subsisting judgment, when in truth, so far from that, it was as much an annulled judgment as though it had been vacated and satisfied on record; for the Act of Parliament which allows a party to plead payment of a judgment as a matter in *pais*, makes that payment as full a satisfaction as a satisfaction on the record. The defendant therefore, published what was not the truth, in the exercise of a legal right, and added to it the sting, which made it pernicious, and therefore illegal, and it is an admitted fact that by reason of that publication the party was driven to bankruptcy and ruin. I should be sorry that there could be a doubt that such conduct was the foundation of an action. I do not know how trade could be carried on, if traders were not protected against such a proceeding as this; and it imports the public, and becomes us, to look into the case anxiously, and if we find ground to condemn such a proceeding as this, to do so; and it is high time the public should cease to be infested by such a nuisance. Every trader in the community should be protected against a proceeding, which is, in fact, an invitation to all his creditors to issue a commission of bankruptcy, in order to prevent his substance being swept away, as it would be if the judgment was such as it was represented, that is, an existing liability. The case in Scotland, therefore, was very different from the present one. The party there acted under an Act of Parliament, and what he did he did *bona fide*, and according to the truth of the transaction. The very contrary has been the case here. These are the grounds which occur to me in this case for coming to the decision that in this matter, whether we look at it as a libel, or as an action on the case for a false representation affecting a trader in his credit, and producing the consequence here alleged, there is a foundation for an action for damages in one light or other, and that therefore the justification attempted fails, for it passes by and omits the sting of the offence, whether we look on the action as one for libel, or as an action on the case. In every view of the case, therefore, we cannot hesitate in holding that there is here a cause of action. Our judgment therefore must be for the plaintiff, allowing the demurrer.

O'BRIEN, J.—I also am of opinion that the demurrer should be allowed. The Lord Chief Justice has gone into the case so fully that it is not necessary for me to go over the facts again. Three of the counts in the summons and plaint are framed in libel, and two in the shape of an action on the case for a false representation. It was admitted by Mr. Sidney that so far as the counts were maintainable as counts in libel, and so far as the defence pleaded to them was pleaded as a justification of the libel, it cannot be sustained, as it does not justify it in the sense imputed in the summons and plaint. The three counts state that the meaning of the publication was, and the publication fully bears it out, that judgment was then an existing liability against the plaintiff and that Johnston was then a creditor of his. This is not justified in the sense so imputed, and the defence, therefore, fails. But it was sought to be said that it was a plea of excuse, which is good; and it was also contended by Serjt. Armstrong, he having a right to fall back on the summons and plaint, that the counts are not maintainable as counts in libel. I was rather startled at being told that such a publication as we have here was not a libel. We were referred to the case of *Parmiter* v. *Coupland*, 6 M. & W. 105, where Parke, B. says that "a publication without justification or lawful excuse, which is calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule, is a libel;" and it was contended that it was thereby stated that such publications,

and such only, were libellous. But that is not so; Parke, B. merely decides that the publication before the court was a libel, because it tended to impute dishonest conduct to the plaintiff; but he never laid it down that nothing save what imputed dishonest conduct was a libel. There is a very proper definition of a libel given in Addison on Wrongs, p. 578, where, enumerating the publications which are libellous, the writer says that publications "which are injurious to the private character or credit of another are libellous." Now, here is a publication of a man engaged in trade, and it represents that he was indebted in a considerable sum by judgment, and when the statement of that is followed in the summons and plaint by the statement that the plaintiff in consequence of that, suffered special damage, the persons who dealt with him refusing to give him any further credit, am I to be told that the publication is not libellous? It is enough to state the general definition of the law of libel, and to state the present pleading, to show that this publication is a libel, and is actionable. Then, am I to be told that we are to disregard the innuendo where the defendant sets up a plea of excuse where a positive meaning is put in and admitted; am I to be told that we are to disregard that? It is enough to state the ground on which the privilege is contended for, namely, the right to publish proceedings in a court of justice. But it is necessary that this publication should be true, not only true in fact, but that it should not be given in such a way as to convey a meaning contrary to the truth. Because a man is justified upon grounds which I do not question, in publishing a record of all the judgment, is he justified in publishing it in such a manner as to convey that not merely judgment, but execution also, was obtained? Many a trader may resist a claim because he thinks it ill-founded, and the claim is paid the moment the action is decided. In this case judgment was obtained on the 19th May, and the amount was paid on the 19th. Are we to be told that the fact of the payment was to be withheld, when the judgment, which is so much affected by that payment, is published? It is an important circumstance that the publication was on the 24th May, 1860, a week after the judgment, and the charge is, that the publication was so framed as to convey a meaning that the debt was then due. Unless it could be contended that the privilege of publishing truth extended to privilege to publish untruth; I do not see how the privilege can be claimed here. I therefore think we do not in this case trench upon the decision of the House of Lords in *Fleming* v. *Newton*. It may be perfectly right that the publication in Scotland was justifiable, but that does not extend to a publication so made as to convey a false representation injurious to a party. But we are told also that two of the counts are unsustainable, because they are not counts for libel, but counts for a false representation. It comes round to the same thing. There is here an innuendo, or what in a libel would be called an innuendo. Well, I do not conceive why, because it does not bear the technical name of an innuendo, when the action is for a false representation, we are to throw it aside. What becomes, then, of the privilege? As I said before, the defence seeks to extend the privilege of publishing truly what is untrue, or publishing in such a manner as to convey an imputation wholly false. Well, we are told now, supposing a proceeding carried on for several days, and a party publishes every morning a true account of what took place the day before, and it is said the character of a party may be greatly injured, and yet will it be contended that the publisher of the newspaper is liable? I say not, because at the time the publication was made the publication was true, and the publisher gave truly all that took place. But I think, if, on the other hand, a man should daily tell all the proceedings that existed, and then give an unfair publication of them, the plea of privilege would be gone. Well, we were referred then to a proposition which, I think, could not be maintained, that except words are defamatory in themselves, their publication is not actionable, although it is followed by special damage. Well, if "defamatory" includes the case which I have put above, I do not quarrel with the proposition; but if it is attempted to confine its meaning to the cases of charges of dishonesty, and matters of that description, I think there is no foundation for it, and the case in 5 B. & Ad. authorises no such proposition, because the words there were not defamatory at all, and there was no innuendo, and the court held that the words themselves being neither defamatory nor injurious, those words unaccompanied by an innuendo were not actionable, though the words were followed by special damage. On these grounds I concur with the judgment of my Lord Chief Justice. On looking to the counts of the summons and plaint, I think something might be said on the fifth count. Of course, it will be for the plaintiff to say, if he succeeds, how far he will take damages on that.

HAYES, J.—I am unwilling to go over the ground trodden by the Chief Justice and my brother O'Brien. I feel I have little to say, except to express my concurrence with them. The declaration consists of two sets of counts. Two of them are for a false representation. *That part of the declaration shows a good cause of* action there is no question. The other set of counts are in libel. Serjt. Armstrong says, that the publication complained of in them does not amount to a libel; but, looking at the whole law, I have arrived at the conclusion that these are good counts in libel, understanding by libel the publication of defamatory matter without justification or excuse; and I take it that this is a publication of such matter, without justification or excuse, and the enunciation of those two words leads me to consider the defence which has been set up. First, then, is it a plea of justification? I think not; and the plain reading of it will convince any one of that. To the two counts for a false representation, the answer set up is a plea of justification, that there was a judgment against the plaintiff on the 17th May, and that it remained on record. I cannot see how that justifies the publication complained of; and I do not see either, how it applies to the counts in libel. Well, is it a plea in excuse? In form it is that; and I take it, that the pleader intended that this should not be a plea in justification, but in excuse. Now, a great deal of argument has been expended to show that every subject has a right to publish records of courts of justice. In the abstract, I agree to that; and even without the authority of the case in Scotland, I would agree to it. But, like every privilege a subject has, he avails himself of it at his peril, and he must be cautious that when he is using it he does not misuse it, as he must bear in mind the axiom, *sic utere tuo ut alienum non ladas*, and when he is publishing records he must take care he does not do it without justification or excuse, to the detriment of another. I think that has been done in this case, for this party has not only published the proceeding, but has published it with a sting or tack added to it. It might not have been actionable to say that one party recovered *a judgment against another; but as he goes on to say that the* relation of debtor and creditor still exists, and thus injures the character of the party who was defendant in that action, he must be responsible; and it is neither justification nor excuse to tell us that there is a record existing unvacated and unannulled, which nobody means to deny. Upon principles, therefore, as old as the old law, we may, I think, safely come to the conclusion that the plea cannot be sustained, and that the demurrer to it must be allowed.

Demurrer allowed.

GENERAL CORRESPONDENCE.

By-law—Conviction—Repeal—Effect thereof.

TO THE EDITORS OF THE LAW JOURNAL.

Prescott, 6 Oct., 1863.

GENTLEMEN,—Is a conviction valid which is made by a Justice of the Peace under a municipal by-law, which is afterwards (that is, after the making of the conviction) quashed for illegality?

Yours truly.

L. C.

[By-laws which are regularly passed, and valid on the face of them, have the force of statute law. Convictions had under them while in force endure notwithstanding their repeal.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. HAWKINS AND OTHERS v. WILLIAMS AND OTHERS.

Executor—Legacy to—Assent.

Leasehold property was bequeathed to three persons, who were also appointed executors of the will, upon certain trusts. One only of the executors proved the will. Six years afterwards he conveyed the whole property, professing to do so as executor.

Held, that lapse of time from the probate of the will was no evidence of assent to the legacy, and that therefore the whole property passed.

C. P. NEVILLE AND ANOTHER v. KELLY.

Reward for discovery and apprehension of felons—Action for—Duty of Police Constable.

Where a police constable apprehended a person on suspicion of having robbed his master, and, before information of such apprehension had been given to the master, he offered a reward. The police constable was held to be entitled to sue for the reward, he having in due performance of his duty communicated the circumstances of the apprehension to his superintendent, who stated the fact to the defendant.

To a declaration claiming a reward under a public advertisement for having given information which led to the recovery of the defendant's property, and the apprehension and conviction of the thief (a boy in the defendant's employ), the defendant pleaded that before the publication of the advertisement the plaintiffs apprehended the thief, and kept him in custody until after the publication of the advertisement, although they knew that he had absconded from the service of the defendant with the property in question, and contrary to their duty they neglected to inform the defendant of such apprehension. The plaintiffs replied that at the time of the apprehension of the boy they were policemen, and that they apprehended the boy, and, in pursuance of their duty as such policemen, informed the Chief Superintendent for the district of the apprehension and of all the circumstances which had come to their knowledge concerning the theft within a reasonable time, and that in consequence thereof and at their request the superintendent informed the defendant, and that such information could not reasonably have been given before the publication of the advertisement.

Held on demurrer, that the replication was a good answer to the plea.

B. C. EX PARTE LEE.

Attorney—Enforcing undertaking—Summary jurisdiction of Court—Breach of faith—Rule to pay money.

L., an attorney, who had issued a *ca. sa.* upon which a defendant in an action was arrested, arranged with the attorney for the defendant that he should be discharged from custody on paying £60 down, and giving his note for £60 at six months. The former sum was paid, and *L.* gave the attorney of the defendant an order for his discharge, on condition agreed to, that it should not be lodged till the defendant's note was obtained. The defendant refused to give his note. The defendant's attorney then said that he would obtain his client's discharge by a judge's order, on conditions in accordance with the agreement. *L.*, upon faith in this, left the order for discharge in the hands of the defendant's attorney, and upon subsequently receiving a summons to show cause why the judge's order should not be drawn up, gave his consent. The defendant's attorney improperly lodged the order for his client's discharge, left with him as above mentioned, without obtaining the judge's order.

Held, upon an application by *L.* for a rule against the defendant's attorney to pay over money according to terms of the order to which *L.* had consented, that those terms were made by him for the benefit of his client, and that the application was without precedent, and must be refused.

C.P. PEDDER v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PRESTON.

Corporation acting in more than one capacity—Banking accounts—Set-off.

A municipal corporation, in addition to its ordinary capacity, acted as managers of baths and wash-houses, and likewise as the local board of health. They had a banking account with the plaintiffs, and had three separate accounts. On the bank suspending payment, a sum of money was due to the corporation from the bank, on the local board of health accounts. The plaintiff sued the defendants for the amount due to the bank, whereupon the defendants set off the amount due from the bank on the other account.

Held, that the defendants might set off this claim one against the other, as the plaintiff and the defendants were debtors and creditors on the separate accounts in the same rights.

EX. EVANS v. ROBINS.

Vendor and purchaser—Misdescription—Ground-rent—Provision for compensation or arbitration—Return of deposit.

On a sale of a "freehold ground rent," "arising out of and secured upon certain houses, with a right to the reversion," which turned out to be an annual sum, payable by the lessee in respect of the user and enjoyment of a garden under the covenant of the owner.

Held, that the purchaser was entitled to a return of his deposit, and held, also, that the usual provision that in case of dispute as to the amount of compensation it should be settled by arbitration, did not apply, the vendor not having resorted to it, but insisted on the full performance of the contract, and the negotiations having thereupon come to an end.

EX. CRESSWELL v. HEDGES.

Tenant in common—Right of as against co-tenant—Destruction of property—Pleading.

One tenant in common sued in trespass by another, for destroying the property, may plead that except in respect of a certain undivided share or shares, he, and not the plaintiff, is entitled or interested, and as to such share or shares payment into court.

CHANCERY.

L. J. LUCAS v. WILLIAMS.

Administration—Executor—Priority.

An executor, who makes himself liable for debts of the testator has no priority in respect of such debts, over the other creditors of the testator, but stands in the same position as the creditors for whose debt he has made himself liable.

M. R. IN RE THE MITRE ASSURANCE COMPANY EX PARTE EYRE.

Winding-up—Contributory—Liability of former holder of shares—Transfer to nominee of directors to stop injury by dissatisfied shareholders.

Where the directors of a company, fearing an exposure of its affairs, entered into a compromise with a disatisfied shareholder, who had presented a petition to obtain the usual winding up order, in pursuance of which compromise, the shares of the petitioner were transferred to one of the directors, a sum of money paid by them to the petitioner, and the petition withdrawn.

Held, that the transfer of his shares, made under such circumstances, did not release the petitioner from his liability in respect of them, and that in the subsequent winding-up of the company, he was properly placed on the list of contributories.

The transfer in question, had not been with all the formalities required by the deed of settlement of the company; but the court considered, that even if these formalities had all been observed the transferor would not have been released from liability.

M. R. BARNETT v. TUGWELL.

Will—Construction—Gift to a class of children legitimate or legitimate

A bequest of property, on the happening of certain events, equally between the children "legitimate or illegitimate" of A. A had five illegitimate children, all of whom were alive at the date of the will. A afterwards married and had nine legitimate children.

Held, that both classes of children took under the bequest, the illegitimate children who were living at the date of the will, being considered as the object designated to take under the gift to the class of "illegitimate children."

The union in one gift to a class of children, of legitimate and illegitimate children, does not invalidate the gift, although the members of each class of children have to be determined upon different principles.

V. C. R. WILKINSON v. DYSON.

Will—Construction—Condition not to interfere.

A testator by his will, gives a legacy to his son W. M. W., upon condition that he does not interfere or intermeddle in the management of the estate, either individually or as solicitor, and he also declares with regard to another son G. B. W., who is abroad, that he shall personally receive his share, not by attorney, or if not personally, by certain means pointed out. W. M. W. is the general attorney under a power for G. B. W. in this country, and after various communications a bill is filed to administer the testators estates, G. B. W. being plaintiff, and W. M. W. one of the defendants, but there is no actual proof that W. M. W. authorised the suit, the question on his examination not being directly put to him, but he admitting that the suit arose in consequence of the communications.

Held, that there was no proof of a breach of the condition, and therefore, that W. M. W. was entitled to the legacy.

Semble, the onus of proving a breach lies on the party alleging it, and the other side cannot be called on to prove a general negative. A case of suspicion is not sufficient, there must be actual proof of the breach.

V. C. R. CURLING v. AUSTIN.

Specific performance—Identity—Way—Compensation—Costs—Evidence in chambers—Objections abandoned and again raised.

Possession by a purchaser, given or permitted by a vendor, without receipt of rents and profits by the purchaser, does not render the purchaser liable to pay the purchase money into court, but he will be ordered to give up possession or to pay the purchase money. If the common decree of specific performance and for an inquiry for title be made, the purchaser may raise objections which he abandoned before the suit, and the court will not add any inquiry on the subject to the decree or direct the chief clerk to state special circumstances. On further consideration, the court will not, on the question of costs or interest, look at any evidence but that in the cause, and not at the proceedings and evidence in Chambers on an interlocutory motion.

A clause in an agreement for purchase, that the purchaser is not to require any further proof of identity than given by the title deeds exempts the vendor from producing further evidence, but he cannot force the title on the purchaser, unless the evidence is complete.

On the sale of a house or stables in an *cul de sac*, the vendor is not bound to show a title to the roadway.

M. R. DAVIS v. ANGEL.

Will—Construction—Condition precedent—Bill by person having a contingent interest.

A devise in trust for A. (in case he should marry the testator's niece Esther) for life, subject to the proviso after mentioned, and after his decease in trust for the eldest son of A, who should be living at his death, and have attained twenty-one, or who should live to attain twenty-one, in fee. Proviso that in case A should not marry Esther, the bequest to him should not take effect, but that such share should fall into the residue.

A., in the testator's lifetime and with his assent, married Isabella, who was still alive, by whom he had a son, the plaintiff in this suit, Esther was also still alive and unmarried. The present suit was instituted to ascertain and secure the plaintiff's interest.

Held, that the marriage of A. with Esther was a condition precedent to the vesting of the bequest, and that the assent of the testator to A.'s marrying a lady other than Esther did not remove it.

Held also, that the plaintiff's interest was a contingent interest, a bill would not lie by him or on his behalf to secure the property.

REVIEWS.

GODEY'S LADY'S BOOK: Philadelphia. The number for October is received, and it contains no less than seven colored figures in the Fashion plate, and ten engravings in wood. It contains also several entertaining stories, such as "Aunt Sophia's Visit," "The Vertical Railways," "The Village with One Gentleman," The Modern Cinderella," "The Sisters' School," and "The Pursuit of Wealth under Difficulties." A new story by Marion Harland, entitled "Leah Moore's Trial," also appears in this number. A Christmas Story, for the December number, also from the pen of Marion Harland, is promised. The terms of the magazine, considering its great utility, are very moderate, viz.: one copy, one year, $3; two copies, one year, $5; three copies, one year, $6; four copies, one year, $7; five copies, one year, and extra copy to the person getting up the club, making six copies, $10; eight copies, one year, and an extra copy to the person getting up the club, making nine copies, $15; eleven copies, one year, and an extra copy to the person getting up the club, making twelve copies, $20.

APPOINTMENTS TO OFFICE, &c.

COUNTY CROWN ATTORNEY.

FRANCIS R. BALL, Esquire, Barrister-at-Law, to be Clerk of the Peace, in and for the County of Oxford, in the room and stead of W. Lapenotiere, Esquire, removed. (Gazetted Oct 10, 1863.)

CHARLES LESTER COLEMAN, of the Town of Belleville, Esquire, Barrister-at-Law, to be Clerk of the Peace, and County Crown Attorney, for the County of Hastings, in the room of John O'Hare, superseded. (Gazetted Oct. 17, 1863.)

CORONERS.

WILLIAM HUME, Esquire, M.D., and WILLIAM CASE WRIGHT, Esquire, Associate Coroners, County of Halton. (Gazetted September 26, 1863.)

PETER STUART, Esquire, and ELIPHALET W. GUSTIN, Esquire, M.D., Associate Coroners, County of Elgin. (Gazetted Oct. 3, 1863.)

JOSEPH CARBERT, Esquire, M.D., Associate Coroner, United Counties of York and Peel. (Gazetted Oct. 10, 1863.)

ANGUS BELL, Esquire, Associate Coroner, County of Grey. (Gazetted Oct. 10, 1863.)

ANGUS BELL, Esquire, Associate Coroner, County Simcoe (Gazetted Oct. 10, 1863.)

AARON WALTER GAMBLE, Esquire, M.D., Associate Coroner, County of Lambton (Gazetted Oct. 10, 1863.)

JAMES HENRY, of the Village of Mono Mills, Esquire, M.D., to be an Associate Coroner for the United Counties of York and Peel. (Gazetted Oct 24, 1863.)

DE WITT MARTYN, of the Village of Kincardine, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce. (Gazetted Oct. 24, 1863.

FRANCIS McCANDLASS, of the Township of London, Esquire, M.D., to be an Associate Coroner for the County of Middlesex. (Gazetted Oct. 24, 1863.)

GEORGE ALVA CARSON, of the Town of Whitby, Esquire, to be an Associate Coroner for the County of Ontario. (Gazetted Oct. 24, 1863.)

NOTARIES PUBLIC.

EDWARD BURTON HAYCOCK, of Ottawa, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted September 26, 1863.)

STAFFORD LIGHTBURN, of Hastings, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted Oct. 3, 1863.)

EDGAR BARKER, of Dunnville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Oct. 3, 1863.)

J. SAURIN McMURRAY, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted Oct. 3 1863.

CHARLES SAMUEL JONES, of the Village of St. Mary's, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada. (Gazetted October 17, 1863.)

DONOUGH O'BRIEN, Esquire, to be a Notary Public for Upper Canada. (Gazetted Oct 24, 1863.)

THOMAS McLEAN, Esquire, to be a Notary Public for Upper Canada. (Gazetted Oct 24, 1863

WILLIAM RASTALL, of Kincardine, Esquire, to be a Notary Public for Upper Canada. (Gazetted Oct. 24, 1863.)

TO CORRESPONDENTS.

"E. L."—Under "Division Courts."

"L. C."—Under "General Correspondence."